18604

Jan 19 Judge Davis

Affirmed —

Judge Miller
Deliv —

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~410.~~ 195

JAMES ESPY, PHILIP HEIDELBACH, LOUIS HEIDELBACH, AND MARUM HEIDELBACH, PARTNERS AS ESPY, HEIDELBACH & CO., PLAINTIFFS IN ERROR,

vs.

THE FIRST NATIONAL BANK OF CINCINNATI.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED AUGUST 26, 1872.

Oct 7 1873

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Cause of action.

Suit brought for money paid, money had and received, money lent, money due on account stated, &c.

LINCOLN, SMITH & WARNOCK,
Att'ys for the Pl'ff.

Security for costs.

L. P. Harrison acknowledges himself security for all costs for which the plaintiff may be liable in this suit. (See precipe.)

And afterwards, to wit, on the 28th day of June, in the year last aforesaid, came the said marshal to whom said writ was in form aforesaid directed, and returned the same into the clerk's office of said court with his proceedings endorsed thereon in the words and figures following, to wit:

Marshal's return to summons.

SOUTHERN DISTRICT OF OHIO, *ss:*

3 I received this writ at Cincinnati, at 3 o'clock p. m., on the 17th day of June 1870, and served the same by copy, as follows:

Personally	on James Espy,	at 12	o'clock	m., on the	18th	day of	June, 1870.
"	" Philip Heidelbach,	" 4	"	a. " "	" 22d	" "	" "
At residence	" Louis Heidelbach,	" 10½	"	a. " "	" 25th	" "	" "
Not found:	Marum Heidelbach,	" 6	"	p. " "	" 28th	" "	" "

A. HICKENLOOPER, *U. S. Marshal, S. D. O.*
Per D. S. SMITH, *Deputy.*

And afterwards, to wit, on the 1st day of July in the year last aforesaid an entry was made upon the journal of said court, in said case, in the words and figures following, to wit:

Leave to declare.

THE FIRST NATIONAL BANK
vs.
ESPY, HEIDELBACH & CO. } 1346. Assumpsit.

By consent it is ordered that plaintiffs have leave to file their declaration in this case within twenty days.

And afterwards, to wit, on the 12th day of July, in the year last aforesaid, came the plaintiff, by its attorneys, and filed in the clerk's office of said court its declaration herein, which said declaration is in the words and figures following, to wit:

Declaration.

The circuit court of the United States for the southern district of Ohio.

THE FIRST NATIONAL BANK, PLAINTIFF,
vs.
ESPY, HEIDELBACH & CO., DEFENDANTS. } Declaration.

The First National Bank of Cincinnati, a banking association incorporated and organized under the laws of the United States and

4 established at Cincinnati, within the southern district of Ohio, plaintiffs, complain of James Espy, Philip Heidelbach, Louis Heidelbach, & Marum Heidelbach, citizens of the State of Ohio, and residents in the southern district thereof, partners, and doing business in the name of Espy, Heidelbach & Co., defendants, in a plea of assumpsit.

For that whereas the said defendants heretofore, viz, on the first day of June, in the year eighteen hundred & seventy, at Cincinnati, in said district, were indebted to the said plaintiffs in the sum of four thousand dollars, for money then & there paid by the paintiffs for the use of the defendants at their request.

And in the sum of four thousand dollars for money then & there had and received by the defendants for the use of the plaintiffs.

And in the sum of four thousand dollars for money then & there lent by the plaintiffs to the defendants at their request.

And in the sum of four thousand dollars for money found to be due from the defendants to the plaintiffs on an account then & there stated between them.

And whereas the defendants afterwards, viz, on the said first day of June, in the year eighteen hundred & seventy, at Cincinnati, in said district, in consideration of the premises, then & there promised to pay the said several sums of money to the plaintiffs on request, yet, though often requested, they have disregarded their said promises and have not paid the said several sums of money, nor either of them, nor any part thereof, to the damage of the plaintiffs in the sum of six thousand dollars, and thereupon they bring suit, &c.

By LINCOLN, SMITH & WARNOCK,
Their Att'ys.

5 And afterwards, to wit, on the 6th day of September, in the year last aforesaid, an entry was made upon the journal of said court, in said case, in the words and figures following, to wit:

Leave to plead.

THE FIRST NATIONAL BANK
vs.
ESPY, HEIDELBACH & COMPANY. } 1346. Assumpsit.

By consent of parties, it is ordered that defendants have leave to file their plea herein forthwith, and the same is accordingly filed.

And which said plea is in the words and figures following, to wit:

Plea.

UNITED STATES OF AMERICA,
Southern District of Ohio:

Circuit court of the United States.

THE FIRST NATIONAL BANK OF CINCINNATI
vs.
ESPY, HEIDELBACH & CO. ET AL. } 1346. Plea.

And the said defendants come & defend the wrong and injury when, &c., and say that they did not undertake & promise in manner and form as the plaintiff has alleged against them; and of this they put themselves upon the country, and the said plaintiffs doth the like.

HOADLY, JACKSON & JOHNSON,
Att'ys for Defendants.

And afterwards this cause was continued from term to term until, to wit, the 29th day of April, in the year of our Lord one thousand eight hundred and seventy-two, on which day an entry was made upon the journal of said court, in said case, in the words and figures folllowing, to wit:

6 *Jury sworn.*

THE FIRST NATIONAL BANK OF CINCINNATI et al. *vs.* JAMES ESPY ET AL.	1346. Assumpsit.

This day came the parties, by their attorneys, and thereupon a jury being called, came, to wit: J. M. Stewart, James R. Moss, James S. Carlow, James H. Wilson, John A. Hardy, Jacob Costigan, George C. Johnson, Foster Priddy, Samuel Rice, Robert Anderson, T. N. Patterson, and A. M. Iliff, who were duly empanneled and sworn well and truly to try the issue joined between the parties; and the evidence not being finished the court adjourned the jury until nine o'clock to-morrow morning, to which time this case is continued.

And afterwards this cause progressed from day to day, until, to wit, the 2d day of May, in the year last aforesaid, when an entry was made upon the journal of said court, in said case, in the words and figures following, to wit:

Verdict of jury & notice of mo. for new trial.

FIRST NATIONAL BANK OF CINCINNATI ET AL. *vs.* JAMES ESPY ET AL.	1346. Assumpsit.

This day came again the parties, by their attorneys, and also the jurors heretofore empanneled and sworn herein, who, having heard the evidence, the arguments of counsel, and the charge of the court, upon their oaths do find the issue joined in favor of the plaintiffs, and do assess the damages of said plaintiffs by reason of the premises, at four thousand three hundred and forty-five dollars and fifteen cents. And thereupon the defendants, by their attorneys, give notice of a motion for a new trial.

7 And afterwards, to wit, on the 6th of May, in the year last aforesaid, came the defendants by Hoadley & Johnson, their attoneys, and filed in the clerk's office of said court their motion for new trial herein, which said motion is in the words and figures following, to wit:

Motion for new trial.

1st National Bank
vs.
Espy, Heidelbach & Co.

And now come defendants and move for a new trial, because—

1st. The verdict is contrary to the law.
2d. " " " " " " evidence.
3d. Misdirection of court in charge to the jury.
4th. Error of court in refusing to charge as requested by defendants.
5th. Error of court in giving charges asked for by the plaintiff.
6th. Error of court in selecting testimony.
7th. " " " in the admission of testimony.

HOADLEY & JOHNSON,
Att'ys Defendants.

And afterwards, to wit, on the 15th day of June, in the year last aforesaid, an entry was made upon the journal of said court in said cause in the words and figures following, to wit:

Judgment.

The First National Bank of Cincinnati
vs. } 1346. Assumpsit.
James Espy at al.

And now this day come said defendants and tendered their bill of exceptions, which is signed, sealed, allowed, and ordered to be made part of the record. And now this cause coming on to *to* be heard upon mo-
8 tion for new trial, heretofore filed herein; and the court being fully
advised in the premises, doth overrule the same; wherefore it is considered by the court that plaintiff recover of the defendants the sum of four thousand three hundred and forty-five dollars and fifteen cents, together with interest thereon from the second day of April, 1872, and their costs herein expended taxed at $, for all of which execution is hereby awarded.

And afterwards, to wit, but on the same day and in the year last aforesaid, there was filed in the clerk's office of said court a certain bill of exceptions herein, in the words and figures following, to wit:

Bill of exceptions.

Circuit court of the United States, sixth circuit & southern district of Ohio:

The First National Bank of Cincinnati
vs.
James Espy, Philip Heidelbach, Marum Heidelbach & Louis Heidelbach, partners as Espy, Heidelbach & Co. } 1346.

Be it remembered that upon the trial of this cause at the April term, 1872, of this court, Honorable Philip B. Swing, district judge, presiding

in the absence of any judge of the supreme court, or any other judge of the circuit court, a jury having been duly empanneled and sworn: The plaintiff, to sustain the issue on its part, introduced testimony tending to show that on April 26, 1870, a stranger, representing himself to be acting for Mrs. E. Hart, of Hamilton, Ohio, purchased a bill of sugars, amounting to twenty-three $\frac{50}{100}$ dollars, in her name, from the firm of Stall & Meyer, grocers, of Cincinnati, Ohio, and paid for the same with a fifty-dollar bank-bill; that he requested said firm to pay
9 him the change or difference, being twenty-six $\frac{50}{100}$ dollars, in a
check on their bankers, as he would rather have such check so as to show his principal that he was making no commission, & that thereupon said Stall & Meyer gave him a check on the First National Bank of Cincinnati, the plaintiff, being an association duly organized as an incorporated National Bank, under the laws of the United States, dated April 26, 1870, for the sum of twenty-six dollars & fifty cents, payable to the order of Mrs. E. Hart.

And the plaintiff further introduced testimony tending to show that said check was thereupon altered by said stranger, by what is called "raising," so as to take out all the written portion thereof, except the signature, and to make the amount payable thirty-nine hundred & twenty dollars, and the name of the payee, Epsy, Heidelbach & Co., by writing the same therein with the date and the word "First" in place of Central, in the name of the bank, and the same sold and delivered to the defendants, who were then private bankers in Cincinnati, who endorsed and collected the same, viz, the sum of three thousand nine hundred and twenty dollars thereon from the plaintiff, through the agency of the clearing-house at Cincinnati, whereof both plaintiff and defendants were members, on the same day, April 26, 1870; that the said alteration of said check was not detected by the plaintiff until late in the afternoon of the next day, April 27, 1870, when it came to light by reason of an apparent overdraft, then first discovered in said account, which overdraft was caused by the check in controversy and other checks afterwards drawn; that the plaintiff immediately attempted to give notice thereof to the defendants by sending such notice to the defendants' banking-house, but found no one there but the porter, and did give such notice the same evening by its cashier to one of the defendants, and at the opening of defendants' bank next
10 morning offered to return said check, and demanded the return
of the said money thereon paid, which the defendants refused.

And further to sustain the issue on its part, the plaintiff examined as a witness its cashier, Theodore Stanwood.

And upon cross-examination, said Stanwood, having testified that W'm H. Sanford, the paying teller of the plaintiff's bank, was the proper officer of said bank to certify checks, which certification, if in writing, was by writing on the check "good" for an amount named, signed by the initials of the teller.

The plaintiff, upon re-examination, proposed to ask him the following question: "State whether or not the First National Bank ever certifies checks verbally, or otherwise than in writing?" To which question the defendants, by their counsel, objected for incompetency; but the objection was overruled, and the defendants then and there excepted; and the witness answered: "Cannot certify any other way than in writing done by the paying-teller writing across the face of the check "good" for the amount, stating it, when properly endorsed, & signing his initials. He then charges the check to the drawer, & makes a memorandum of the details of the check in a book kept for that purpose, which is crossed off on payment."

And the defendants, to sustain the issue on their part, introduced testimony tending to show that, during bank hours, on the morning of April 26, 1870, a well-appearing stranger came into their bank, & expressed a desire to purchase three thousand dollars in United States five-twenty bonds and five hundred dollars in gold, in both of which kinds of property it is a part of their business to deal; that the price was agreed on, viz, the sum of thirty-nine hundred & twenty
11 dollars, that being the market-price thereof at that time; that said stranger said he was doing business through the firm of Stall & Meyer, & would have to go to their store for a check, and might be absent one or two hours; that in about two hours, he returned and produced the check in question in the form in which it now appears, being the same raised check described by plaintiff's witnesses, and of which the following is a true copy:

"No. 2923.] Cincinnati, *April* 26, 1870.

"First National Bank of Cincinnati. Pay to the order of Epsy, Heidelbach & Co. three thousand nine hundred & twenty dollars, value received.

"$3.920 00.] STALL & MEYER."

and offered said check to the defendants for the gold & bonds aforesaid; that the name Espy, in the defendants' firm name is and was then very frequently mispelled Epsy, and that such transposition of letters was not calculated to attract, and did not attract attention; that there was nothing suspicious in the appearance of the check, nor was its value suspected or doubted, the said alteration or raising having been so skillfully done as to be impossible of detection by inspection of the check; that said check was made by filling up one of the regular blank checks of Stall & Meyer on the Central National Bank, the printed word "Central" being erased by drawing ink lines through it & writing the word "First" over it & the number being in the regular series of printed numbers at the point reached in their business, and of the date of the check, which printed blanks Stall & Meyer were then using, said Central National Bank having then recently ceased to do business, and its customers and accounts transferred to the plaintiff; that the banking-house of the First National Bank of Cincinnati was then situated one square distant from the banking-office of the defendants, and the
12 store of Stall & Meyer was then situated three squares from said last-named banking-office and two squares from the plaintiffs' bank; that it was then the custom of the banks & bankers in Cincinnati, including the plaintiffs & defendants, when a check is presented by a stranger, if made payable to the order of the bank to which it is presented, to send it for advice of its value not to the drawer of the check, but to the bank on which it is drawn; that the defendants informed said stranger that, as he was a stranger to them, they could not take said check & part with their said bonds and gold until they had sent to the plaintiff and ascertained its value; that, thereupon, the defendants' teller, Ansel G. Jenney, took the check from said stranger and handed it to George Schnarrenberger, one of the messengers of said bank, and told him to take it to the said First National Bank, & show it to William H. Sanford, paying-teller thereof, and ask him to examine it very particularly, because it was presented to him by a party he, said Jenney, knew nothing about; that, thereupon, said Schnarrenberger took said check

to the First National Bank, and handed it to said Sanford, the paying-teller thereof, and asked him to examine it very particularly, because it was presented to said Jenney, teller of the defendants, by a stranger; that said Sanford is the proper officer of the plaintiff and duly authorized to certify or pay checks, or to furnish verbal or other information of their value; that said Sanford, said teller, then examined said check very particularly, comparing it with other checks of Stall & Meyer, and with the signature-book, and examining the amount their credit on the books of said bank; that, after a partial examination, he said he was not very familiar with Stall & Meyer's checks, as the account had been transferred from the Central but a short time; and he then continued such examination, at the end of which he returned it to said Schnarrenberger, with the reply: "It is all right; send it through the clearing-house;"
which reply said Schnarrenberger, at once returning to the defend-
13 ants' bank, communicated, at the same time handing back the
check to their teller, said Jenney, as follows: "It is all right; send it through the clearing-house," or "it is all right; put it through the clearing-house;" and said Jenney immediately accepted said check from said stranger in exchange for said bonds and gold, and delivered said bonds and gold to said stranger who, without delay, departed with them to parts unknown, and has never since been seen or heard of by any party or witness in this case; that said check was thereupon, on the same day, collected by the defendants from the plaintiff, through the said clearing-house; that said clearing-house is and was then an incorporated association of the banks and bankers in Cincinnati for the easy mutual daily settlement of balances and exchange of checks between them, into which each bank brings and then brought daily after 2¼ o'clock p. m. all the checks received and held by it drawn upon any of the other banks, members of the clearing-house, and receives, and then received in exchange the checks drawn upon it held by the other banks and bankers, members of the clearing-house, balances being settled in cash; and that the defendants were induced by the answer returned to their inquiry, through their said messenger, addressed to the plaintiff's teller, Sanford, to part with said gold and bonds for said check.

To rebut which the plaintiff introduced testimony tending to show that when the plaintiff's teller, Sanford, was addressed by the defendant's messenger, nothing was said by said messenger with reference to the check having been presented to said Jenney by a stranger, and that the reply of said Sanford to said messenger was, "The check is good, or all right, send it through the clearing-house." And further that said Sanford, by way of caution, told said messenger at the same time that if said check was offered by a stranger, he would advise them
to have nothing to do with him; that he would be careful and not
14 pay so large a check to a stranger, no matter how good-looking
he was; that he, said Sanford, examined said check very carefully, and saw nothing about it to lead him to doubt that it was Stall & Meyers' genuine check for that amount, examining not only their signature in the signature-book, but all their signatures on checks, presented before that time, drawn by them.

And the witness, Sanford, further testified that, when checks had been presented by a stranger, he had, more than a hundred times, sent them to the drawers for advice of value.

Thereupon the plaintiffs asked the witness, said Sanford, the following questions:

"What effect, if any, did the filling up of the check in the name of

Epsy, Heidelbach & Co., have upon the examination of the check? If it lead in your mind to any conclusion as to the parties with whom the transaction was made, at the time, state what it was." To each of which questions the defendants objected, because of incompetency; and the court overruled the objections. And the defendants excepted to said overruling, and to the permission, by the court, to the putting, by the plaintiff, of either of said questions.

To which questions the witness answered that he supposed Espy was sharp enough to know with whom he was dealing, and that he supposed he was dealing directly with Stall & Meyer; which answer the defendants moved the court to exclude from the jury as incompetent; but the court overruled the motion, and the defendants excepted.

And the plaintiff then asked the witness, Sanford, the following question:

"When a check of this character is presented by one bank to another, with the request to know whether it is good or not, has this term any special or limited meaning among bankers? If so, to what is it limited or confined?" To which question the defendants objected, 15 on the ground of incompetency; but the objection was overruled, and the defendants excepted.

And the plaintiff further gave testimony tending to show that the term "good," or "all right," under circumstances as aforesaid, among bankers, meant to refer, and by the usage of Cincinnati banks, at and about April 26, 1870, would be understood to refer to the genuineness of the signature, and the state of the drawer's account only.

And the plaintiff examined, as a witness, W. A. Goodman, who testified that he was vice-president of the Third National Bank of Cincinnati, & that he had been all his life a banker in Cincinnati, and was familiar with the customs and usages of banks and bankers in Cincinnati; and the plaintiff then put him the following question: "When a check is sent by a bank, to which it is offered, to the bank upon which it is drawn, to know whether it is good or not, and the answer is, 'That is good,' or 'All right'—if that answer has acquired any peculiar or limited meaning among bankers, state what that meaning is, and to what it is limited." And the defendants objected, on the ground of incompetency. But the court overruled the objection, and permitted the question to be answered; and the defendants thereto excepted.

And the defendants thereupon, the witness having said that it had acquired a peculiar or limited meaning, and was understood to refer to the genuineness of the signature, and whether the money was in bank to meet the check; and on cross-examination that he had never heard the subject of the meaning of said terms discussed, or any question made as to the same, or known of any transaction requireing a decision as to their meaning before April 26, 1870; and having further testified that the terms "it is good,' or "it is all right," "send it through the clearing-house," had not acquired any peculiar or limited meaning—the defendants moved to exclude the answer given to the question last aforesaid, as incompetent & irrelevant; which motion the court overruled; and the defendants excepted to said overruling.

16 And the plaintiff further introduced as a witness H. B. Bissell, who, having testified that he had been for many years a banker of large experience in Cincinnati, and was familiar with the customs and usages of bankers in Cincinnati, was asked by the plaintiff the following question: "What, if any, custom or usage exists among banks and bankers in Cincinnati as to sending checks presented by a stranger

to the drawer or to the bank on which the check is drawn for advice as to its value ?" To which question the defendants objected because of incompetency, but the court overruled the objection, and the defendants excepted to said overruling, and the witness answered that he could only answer from his own practice. Whereupon the defendants objected to the witness further answering the question; but the court permitted him to proceed, to which the defendants objected; and the witness further continued to answer the question.

And the plaintiff also offered testimony tending to show that, although there was a usage for one bank to which a check was offered to send it to another bank, on which it was drawn, to know as to the genuineness of the signature and the state of the account, there was no usage of their sending to inquire, or of a banker's passing on the filling up, or whether the check had been raised or not, and that it was impossible to detect a raised check, or to tell whether it was raised or not; that, when the messenger, Schnarrenberger, presented the said check, their attention was not called to the filling up, nor was any question asked with reference to that, nor was any statement made by the messenger that they would, in fact, take the check, or were going to take the check; nor did the plaintiff know what the transaction between the defendants and said stranger was, nor that it would be consum'ated, nor anything that was communicated by said messenger, as hereinbefore specified; nor did
the plaintiff know that the defendant had, in fact, taken the
17 check until it came to it in the regular process of collection, as
aforesaid, through the clearing-house.

And the said Goodman, Bissell, Griffith, and Stanwood, all experienced bankers, testified that, when checks of this kind, of large amount, were presented by strangers to their banks, they did not take them without learning who he was.

And the plaintiff also proved by the testimony of said Sandford that Stall & Meyer's account on April 26, 1870, was good for the check aforesaid, as raised, and all other checks of said Stall & Meyer drawn and presented that day, and did not appear to be overdrawn until the presentation of checks drawn by them the next day, and was not then overdrawn, in fact, as the checks against it were drawn by Stall & Meyer themselves, but was made so to appear only by reason that said check had been raised without their knowledge.

And the testimony having been closed, and the cause been argued by the counsel on both sides to the court and jury, the plaintiff asked the court to charge the jury as follows, viz: In charges numbered from one to ten inclusive; and the defendants asked the court to charge the jury as follows, viz: In charges numbered from one to eight inclusive.

FIRST NATIONAL BANK
vs.
ESPY, HEIDELBACH & CO.

Charges asked by plaintiffs.

First. We ask the court to charge the jury that, if the check in question was originally the check of Stall & Meyer for $26.50, payable to the order of Mrs. E. Hart; and after it was passed from said Stall & Meyer, it was fraudulently raised from a check of $26.50 to a check of $3,920.00 by the taking out of the original amount and name of the
payee and inserting the name of the defendants as payee, and
18 making it a check for $3,920.00, and the same was passed to the

defendants by the holder so altering it, and the same was afterwards endorsed by the defendants, and sent through the clearing-house so endorsed, and by the operation of the clearing-house was paid by the plaintiffs; and if the plaintiffs, when it was so paid, had no knowledge or supposition that it was a raised or altered check, but paid it supposing it to be a genuine check of Stall & Meyers for $3,920.00, and had no good reason to believe otherwise, then the fact that it was drawn upon them, and paid by them, forms no barrier to their recovery unless they are in some way estopped from setting up such defence.

Second. That, in order to estop the plaintiffs from a recovery in such case, they must have been guilty of something like fraud or such gross carelessness as amounts to a breach of moral duty; that the fact that the defendants sent the check to the plaintiffs' bank by a messenger before they took it, and enquired of the paying-teller of the plaintiffs if it was good, and he, after carefully examining it and the state of the account, pronounced it good or all right; that such fact does not estop the plaintiffs from recovery, if the said teller informed the messenger of the defendants so presenting the check that he was not very well acquainted with their checks, and he made a fair and honest examination of the check, and was a skillful teller, and pronounced an honest opinion upon the subject that it was good or all right, the signature being the real signature of Stall & Meyer, and their account on the day being good for that amount—that, in such a case, the plaintiffs are not in law bound at their peril to know that the check had not been raised or altered in its body, provided it was so skillfully done that a skillful teller
would not be likely to detect such alteration; that while the law,
19 from reasons of public policy, makes a party upon whom a check
is drawn responsible for a knowledge of the signature of the drawer, it does not require him to know that a check has been raised, or thus altered in the body of it; and if, after a careful examination of such check, he pays it upon the reasonable belief that it is genuine, then he may recover the same from the party to whom he has paid it, unless guilty of some fraud or gross neglect in relation to the same.

Third. That if it is not usual or customary for bankers upon whom checks are drawn to pass in advance upon the genuineness of filling up, and it is impossible for them to detect such alterations, and if, on the other hand, it is usual for them to pass upon the state of the account and the genuineness of the signature to the check, and they have superior and reasonable means of ascertaining such facts and the signature thereto is genuine, and if the holder in such case requests of the drawee to know whether it is good, and such inquiry may be well understood to relate to the state of the account and the genuineness of the signature, and is so understood by the bank teller of whom such inquiry is made; and if such teller makes a careful examination of the check, and gives a fair and honest answer that the check is "good," or "all right," meaning thereby to refer to the state of the account and the genuineness of the signature, then his answer to such inquiry, that the check is "good," or is "all right," cannot be held to be an estoppel to prevent his showing that the check was fraudulently raised or altered, or so as
to prevent a recovery of money paid in such case.

20 Fourth. That the check being payable to the defendants' order,
if the defendants had a large moneyed transaction with the party from whom they received it, the plaintiffs had a right to suppose that the defendants exercised due care and diligence to ascertain who the party was from whom they obtained it, and how he came by it, before they should indorse it, and if the plaintiffs were in no way connected

with the said transaction, and had no interest in it or knowledge of it, and paid the check solely upon the faith that it was a bona-fide check of Stall & Meyer for the amount so paid, and exercised due care themselves in relation to the check, then, if it be the genuine signature of Stall & Meyer, but a check so skillfully altered or raised in the body thereof that a skillful bank-teller could not detect it, then, the facts being shown, the plaintiffs may recover the amount so paid.

Fifth. If the defendants, before receiving this check, sent their messenger to the plaintiffs' bank to examine the check carefully, and see if it appears from the evidence that among bankers at that time such a request is understood to refer to the genuineness of the signature and state of the account, this inquiry must be presumed to be intended to refer to those parts of the check, and to which they had the means of giving accurate information, and nothing else, and if as to these matters true answers were given, and the plaintiffs' teller gave his honest judgment as to the general character of the check, and had no knowledge of and could not readily discover this alteration by an inspection of the check, then the plaintiffs are not estopped from recovering this money.

21 Sixth. If it appears from the evidence in this case, that at the time of this transaction the words "good" or "all right" among bankers was simply understood to refer to the genuinenesss of the signature and the state of the account, and the said words were so used and intended to be used by Mr. Sanford at that time when he said the check was "good" or "all right," and if the said check had a fraudulent alteration, so skillfully done as not to be readily discovered by an inspection, and which was not known to either party at the time the said check was presented to the paying-teller of the 1st National Bank, and if the signature of said check was genuine, and the account good, then the said plaintiffs are not estopped from recovering the said money in this action by reason of the said answer given by Mr. Sanford.

Seventh. If the check in suit was originally a genuine check for $26.50, signed by Stall & Meyer, and drawn by them upon the plaintiffs' bank, and payable to the order of one Mrs. E. Hart, and said check was afterwards fraudulently altered by some one unknown from $26.50 to $3,920.00, and changing the name of the payee from Mrs. E. Hart to the defendants, and so skillfully altered as not to be readily detected by a careful inspection of the instrument itself by an experienced bank-teller, whose duty it was to examine and pay checks, and if the check thus altered was presented by the defendants to the plaintiffs' teller, who said it was "good" or "all right," and afterwards paid the same through the clearing-house to the defendants, the said plaintiffs then believing it to be a genuine check for said sum of $3,920.00, then the said plaintiffs are not thereby estopped from recovering back the said money from the defendants.

22 Eighth. That a bank upon whom a check is drawn purporting to be the check of one of its depositors, and which is so skillfully raised or altered that it cannot be detected, is not bound at its peril to know that it is not raised or altered, and if the bank pays such check upon the supposition that it is genuine, it may recover back the money of the party to whom it is paid, as money paid under a mistake of fact.

Ninth. That the plaintiffs cannot be held to guarantee the check as against a fraud caused by the erasure and alteration of the body of the check, if neither party had any idea or suspicion of such alteration, and their minds were not directed to it, and no discussion or negotiation was had about it in any way, and no consideration was given therefor.

Tenth. That the burden of proof is upon the defendant to make out a case of estoppel, and if the evidence is equally divided upon such point, or the jury cannot come to any conclusion upon it, the verdict must be against the defendants upon such point.

Charges of defendants.

First. If the jury believe from the evidence that the check in question was sent by defendants to First National Bank for information as to its value when presented to them, and before parting with the possession of their bonds and gold, and that defendant's messenger in reply was instructed by the paying-teller of the First National Bank that the check was all right, to send it through the clearing-house for payment, or words to that effect, and that, upon the faith of that information, defendants parted with their gold and bonds, received the check in payment thereof, passed the same through the clearing-house, and the same was paid by the plaintiff, plaintiff is estopped from claiming that the payment was made by mistake, and cannot recover in this suit 23 even though it appear that, without any connivance of defendants, the check in question had been fraudulently altered from $26.50 to $3,920 before the same was sent to the plaintiffs for information as aforesaid.

Second. The rule of law is, that where one of two innocent parties must suffer a loss, he who has exposed the other to the hazard must bear the burden, and if, therefore, the jury find from the testimony that plaintiff and defendants were both innocent of any intention of misleading the other, and that both acted in good faith, and that plaintiff misled defendants by the information communicated to them relative to the check, whereby defendants were induced to part with the possession of their property, plaintiff will not be entitled to recover in this action.

Third. The plaintiff seeks to recover on the ground that the money in dispute was paid by mistake. Now, if the jury believe from the evidence that the mistake in question would not have occurred, but for the assurance of the plaintiff's teller, Sanford, to the messenger of the defendants to the effect that the check was good, collect it through the clearing-house, and that, upon the faith of this assurance, the defendants took the check, and paid for it in gold and bonds, then the plaintiffs themselves contributed to the mistake, and cannot recover.

Fourth. A verbal certification of a check is equally valid with a written certification, and constitutes a contract, obligatory on the party giving the certification, the consideration of which is the property parted with by the party receiving the certification on the faith of the certification.

Fifth. An inquiry by one banker being in possession of a check 24 addressed to another on whom the check was drawn as to the value of the check, if answered by the proper officer of the latter bank, "It is all right;" "put it through the clearing-house," a verbal certification of the check, and if the banker to whom it was addressed thereon parted with the property on the faith of this certification, and thereby became the owner of the check, the transaction constituted a contract binding the drawee bank, and if at once collected through the clearing-house, the money cannot be recovered back, if, without connivance or knowledge of either banker, the check, before coming into possession of the defendants, had been fraudulently altered by a third person from $26.50 to $3,920.

Sixth. That a bank, upon which a check is drawn, is bound when the check is presented for payment to know whether it is justly payable or not, and if it pay the amount thereof to a holder who is innocent of any complicity with or knowledge of any alteration in the body of the check, committed before he became holder, the money cannot be recovered back, although, after the check was drawn, it was fraudulently altered so as to change the amount.

Seventh. That if the jury believe, from the evidence, that the language used by Sanford, the plaintiff's teller, to the defendant's messenger upon presentation of the check for information of its value, was, "It is good, send it through the clearing-house," testimony of usage as to the terms "it is good" is not to be regarded by the jury, but the words are to be taken in their ordinary acceptation.

Eighth. If the jury find that the answer of Sanford was to the enquiry of defendants that the check was good; send it through the
25 clearing-house, then said answer amounted in law to a certification of the check that the same was good in law for the amount named in the check as it was when presented to Sanford, and that amount would be paid thereon, when sent through the clearing-house.

And the court having given to the jury the 1st, 2d, 3d, 4th, 7th, 8th, 9th, & 10th charge, prayed for by plaintiff, and having refused the 5th & 6th, defendants severally excepted to the giving of the charge so as aforesaid, and to each of them.

And thereupon the court refused to give to the jury the first charge asked by defendants; to which refusal defendants excepted.

And the court also refused to give to the jury the second charge as prayed for by defendants, but gave the same with the following modification: "That the jury must be satisfied that the enquiry of defendants was as to whether the check was good in each and every respect, and that plaintiff so understood it, as applying not only to the signature, and that the amount named in the check stood to the credit of Stall & Meyer, but that it was good in every other respect and was not a raised check from a small amount to a larger one;" to which said refusal to give said charge as asked by defendants and the giving the same as modified, defendants excepted.

And the court also refused to give the third charge as asked by defendants, but gave the same with the following modification: "But the jury must be satisfied that Sanford intended by his answer to the question addressed to him to certify that the check was not a raised one. His reply to the effect that the check was "good; send it through the clearing-house," in law being simply a certification that the signature to the check was genuine, and that the amount therein named stood to the credit of the drawers on the books of the bank;" to which
26 said refusal to give said charge as asked and the giving the same as modified, defendants excepted.

And the court gave the fourth charge to the jury as prayed for by defendants.

The fifth and sixth charges severally asked for by defendants, the court refused to give to the jury; to which said refusal, so as aforesaid, and the refusal to give either of them, defendants excepted.

And the court refused to give to the jury the seventh charge as prayed for by defendants, but gave the same with the following modification: "which mean that the signature to the check is genuine, and that the bank has funds of the drawer on hand in sufficient amount to meet the check;" to the refusal to give said charge as prayed for by defendants, and giving the same as modified, defendants excepted.

And the court refused to give the eighth charge as prayed for by defendants, but gave the same with the following modification: "That the answer of Sanford, in law, amounted to a certification only that the signature to the check was genuine; that the amount thereof stood to the credit of the drawers on the books of the bank, and that it would be paid when sent through the clearing-house if it was genuine in all other respects;" to the refusal to give said charge to the jury, and to giving the same as modified, defendants excepted.

And thereupon the court charged the jury as follows:

If the object of the defendants in sending the check to the plaintiffs was to have them examine the same and pass upon the genuineness of the signature of the drawers, and the state of their account with them, and the plaintiff so understood their object, and returned to them the answer, "That it is good, or all right; send it through the clearing-house," such answer would be a parol certification of the check, as to the genuineness of the signature, and that the drawers had funds in their
27 hands to meet it, and the plaintiff by such parol certification
would be stopped from denying either that the signature was genuine or that the drawers had funds to meet the check. If the defendants, in order to test the genuineness of the signature of the drawers, that they had funds in their hands to meet it, and to test its genuineness in all other respects, sent it to the plaintiff for inspection and examination, and the plaintiff, knowing the full extent of the object for which it was sent, sent back the reply that "It is good; or it is all right," and the defendants relied upon that answer, and were induced to act upon it, and parted with their bonds & gold upon the assurance of the answer, the plaintiff will be estopped from setting up the fact that the check was a raised check.

If the defendants had no suspicion of the check being a raised check, and sent the check to the plaintiff for the purpose of examination, without specifying the particulars to which they wished the examination directed, the plaintiffs had a right to presume that such examination was desired in relation to such points of which the law presumed them to have knowledge, to wit, the genuineness of the drawer's signature, and the state of their account, and if in good faith they made examinations in regard to these points, and they had no knowledge of the raising of the check, or had no particular means not common to the defendants of knowing that it had been raised, their answer to the inquiry must be confined to the genuineness of the signature of the drawers and the state of their account, and cannot be extended as an assurance or guarantee that the check is not a raised check, and plaintiffs are not estopped from setting up such fact. If the defendants and the plaintiffs were mutually ignorant of the fact of the raising of the check, and neither party had any suspi-
28 cion that it had been so raised, and the parties having within
their power equal means of ascertaining that fact, the law did not impose upon the plaintiff more than upon the defendant the duty of calling upon the drawers to ascertain whether such check had been so raised, and if the plaintiff under such circumstances paid the amount of said check to the defendants, such payment is not an adoption of the check as genuine, and the plaintiffs are not bound by said payment, and are not estopped from showing that the check was so raised.

To so much of said charge, in the following words, defendants excepted, viz:

"If the defendants, in order to test the genuineness of the signature of the drawers, that they had funds in their hands to meet it, and to test its genuineness in all respects, sent it to the plaintiff for inspection and examination, and the plaintiff, knowing the full extent of the object for which it was sent, sent back the reply that 'It is good, or it is all right,' and the defendants relied upon that answer, and were induced to act upon it, and parted with their gold & bonds upon the assurance of the answer, the plaintiff will be estopped from setting up the fact that the check was a raised check."

To so much of said charge, in the following words, defendants excepted, viz:

"If the defendants had no suspicion of the check being a raised check, and sent the check to the plaintiffs for the purpose of examination, without specifying the particulars to which they wished the examination directed, the plaintiff had a right to presume that such examination was desired in relation to such points of which the law presumed them to have knowledge, to wit, the genuineness of the drawers' signature and the state of their account; and if in good faith they made examination in regard to these points, and they had
29 no knowledge of the raising of the check, or had no particular means not common to the defendants of knowing that it had been raised, their answer to the enquiry must be confined to the genuineness of the signature of the drawers, and the state of their account, and cannot be extended to an assurance or guarantee that the check is not a raised check, and plaintiffs are not estopped from setting up such fact."

And to so much of said charge, in the following words, defendants excepted.

"If the defendants and plaintiffs were mutually ignorant of the fact of the raising of the check, and neither party had any suspicion that it had been so raised, and the parties having within their power equal means of ascertaining that fact, the law did not impose upon the plaintiff, more than upon the defendant, the duty of calling upon the drawers to ascertain whether said check had been so raised, and if the plaintiffs under such circumstances paid the amount of such check to defendants, such payment is not an adoption of the check as genuine, and the plaintiffs are not bound by said payment, and are not estopped from showing that the check was so raised."

Whereupon defendants tendered this their bill of exceptions, and prayed that the same might be signed, sealed, allowed, and made part of the record. Which is done accordingly.

PHILIP B. SWING, [SEAL.]
District Judge United States for the Southern Dist. of Ohio, sitting as Circuit Judge in said District.

30 And afterwards, to wit, on the 12th day of July, in the year last aforesaid, came the defendants and filed in the clerk's office of said court their error-bond herein, which said bond is in the words and figures following, to wit:

Error-bond.

Know all men by these presents that we, Thomas Sherlock, Hugh W. Hughes, & Daniel J. Fallis, all of Cincinnati, in the State of Ohio, are held & firmly bound unto the First National Bank of Cincinnati in the penal sum of nine thousand dollars, to the payment of which, well & truly to be made, we do hereby jointly & severally bind ourselves, our & each of our heirs, executors, & administrators firmly by these presents, sealed with our seals & dated this 12th day of July, A. D. 1872.

The condition of the above obligation is such that whereas James Espy, Philip Heidelbach, Louis Heidelbach, & Marum Heidelbach, partners as Espy, Heidelbach & Co., have obtained an allowance of a writ of error upon a certain judgment rendered in the circuit court of the United States within & for the southern district of Ohio in favor of the said the First National Bank of Cincinnati and against the said James Espy, Philip Heidelbach, Louis Heidelbach, & Marum Heidelbach, partners as Espy, Heidelbach & Co.

Now, if the said James Espy, Philip Heidelbach, Louis Heidelbach, & Marum Heidelbach, partners as Espy, Heidelbach & Co., shall pay the condemnation-money & costs in case the said judgment of the said circuit court shall be affirmed by the Supreme Court of the United States, in whole or in part, then the above obligation shall be void; otherwise in full force & effect.

THO. SHERLOCK. [SEAL.]
H. W. HUGHES. [SEAL.]
D. J. FALLIS. [SEAL.]

Signed & sealed in presence of us—
JOHN W. HARTWELL.
W. BYRON CARTER.

Approved.

P. B. SWING, *Judge.*

31 THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, Thomas Ambrose, clerk of the circuit court of the United States within and for said district, hereby certify the foregoing transcript to be truly taken and copied from the files and record of said court, as the same remain in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Cincinnati, this 12th day of July, A. D. 1872, and in the 97th year of the Independence of the United States of America.

Attest:
[SEAL.] THOMAS AMBROSE,
Clerk Cir. Court U. S., South'n Dist. Ohio.

32 Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of circuit court of the United States within and for the southern district of Ohio, greeting:

Because in the record and proceedings, and also in the rendition of a judgment, in a plea which is in the said circuit court before you, between The First National Bank of Cincinnati, plaintiff, and James Espy, Philip Heidelbach, Louis Heidelbach, and Marum Heidelbach, partners doing business in the name of Espy, Heidelbach & Co., defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, on the first Monday in the month of December next, in the said Supreme Court, then and there to be held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this eighth day of July, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States of America the 97th.

Attest:

[SEAL.] THOMAS AMBROSE, *Clerk.*

33 THE UNITED STATES OF AMERICA:

Supreme Court of the United States.

To the First National Bank of Cincinnati, greeting:

Whereas James Espy, Philip Heidelbach, Louis Heidelbach, & Marum Heidelbach, partners doing business in the name of Espy, Heidelbach & Co., have obtained the allowance of our writ of error to the circuit court of the United States within and for the southern district of Ohio, directed to remove into the said Supreme Court, to be holden at the city of Washington, on the first Monday in the month of December next, the record of a certain plaint, process, proceedings, and judgment in an action of assumpsit, wherein you, thesaid The First National Bank of Cincinnati, in that action lately recovered against the said James Espy, Philip Heidelbach, Louis Heidelbach, and Marum Heidelbach, a judgment for four thousand three hundred and forty-five dollars and fifteen cents and costs, as by the said record in the said circuit court remaining appears, in which said record and proceedings, and also in the rendition of the judgment thereupon, a manifest error hath intervened, as by the said James Espy, Philip Heidelbach, Louis Heidelbach, and Marum Heidelbach, we are informed, and our said writ of error granted, issued, and allowed as aforesaid, for the purpose of correcting the errors aforesaid alleged, if any there be: You are, therefore, hereby commanded and cited to be and appear before the judges of the said Supreme Court, at the city of Washington, at the next term of said court, to be holden on the first Monday in the month of December next, to have the errors aforesaid corrected, and the judgment of our said Supreme Court thereupon.

34 Witness, the Honorable Salmon P. Chase, Chief Justice of the United States of America, this 8th day of July, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States of America the 97th.

[SEAL.] PHILIP B. SWING,
One of the Judges of the Circuit Court of the
United States for the Southern District of Ohio.

We hereby acknowledge service of the foregoing citation for the First National Bank of Cincinnati, the defendant in error.
Cincinnati, July 12, 1872.

LINCOLN, SMITH, WARNOCK, & HEFLEY.
Att'ys for Defendants in error.

(Indorsement on cover:) No. 410. S. Ohio, C. C. U. S. James Espy, Philip Heidelbach, Louis Heidelbach, and Marum Heidelbach, partners, as Espy, Heidelbach & Co., plaintiffs in error, vs. The First National Bank of Cincinnati. Filed 26 August, 1872.

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Supreme Court of the United States.

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Espy, Heidelbach & Co.,
Plaintiffs in Error,
vs.
The First National Bank of Cincinnati,
Defendant in Error.

◆

Error to the Circuit Court for the Southern District of Ohio.

◆

Argument for Plaintiffs in Error, by
HOADLY & JOHNSON.

F. W. Freeman, Printer, S. W. Cor. Third & Walnut Sts., Cin., O.

Supreme Court of the United States.

Espy, Heidelbach & Co.,
Plaintiffs in Error,
vs.
The First National Bank of Cincinnati,
Defendant in Error.

Error to the Circuit Court for the Southern District of Ohio.

Argument for Plaintiffs in Error, by
HOADLY & JOHNSON.

I.

STATEMENT OF THE CASE.

This is a writ of error, prosecuted to reverse a judgment of the Circuit Court of the United States, for the Southern District of Ohio, at the April term, 1872, recovered by the First National Bank, of Cincinnati, plaintiff below, in the sum of $4,345 15, against James Espy, and others, partners as Espy, Heidelbach & Co., defendants below, and now plaintiffs in error.

The parties are both bankers, in Cincinnati. Stall & Meyer, grocers, of the same city, were, on April 26, 1870, depositors with the First National Bank. It was proved, (Record 7,) that, on that day, a well appearing stranger came to the banking house of Espy, Heidelbach & Co., and proposed to purchase five-twenty bonds and gold, in which they deal, and agreed with them on $3,920, as the currency price of bonds to the amount of three thousand dollars and gold to the amount of five hundred dollars; that he informed them he was doing business with Stall & Meyer, and would have to go to their store for a check, and be absent one or two hours; that in about two hours, he returned with what purported to be Stall & Meyer's check on the First National Bank, to the order of Epsy, Heidelbach &Co., for $3,920, which he offered to the defendants, for the gold and bonds; that the defendants' teller, Jenney, sent the check by a messenger to the First National Bank, and directed him to tell the plaintiffs' teller, Sanford, to examine the check very particularly, because presented by a stranger, and this, the messenger, as he testified, did; that (Record, 8,) this teller is the proper officer of plaintiffs, to certify or pay checks, or furnish verbal or other information of their value; that plaintiff's teller, Sanford, scrutinized the check carefully, compared the signature with other signatures of Stall & Meyer, examined the state of their account, and finally returned it to the messenger, with the words, "It is all right; send it through the clear ing house;" or as shown by the plaintiff's testimony, "The check is good, or all right, send it through the clearing house," (Record, 8,) that the messenger at once returned to the defendants' bank, and informed Jenney, their teller, handing him back the check, that the plantiff's teller's reply was, "It is all right; send it through the clearing house," or "It is all right; put it through the clearing house." That thereupon, Jenney, for the defendants, being thereto induced by said reply, accepted the check, and delivered the bonds and gold to the stranger, who went his way and was heard of no more; that the defendants, on the same day, collected the check from the plaintiffs, through the Cincinnati Clearing House, of which both parties were members.

It further appeared, that on the afternoon of the next day, April 27, it was discovered that this was what is called a raised check, the signature and date only being genuine; so ingeniously altered from a genuine check, of smaller amount and other payees, as to defy detection; and thereupon the plaintiffs demanded the return of the money from the defendants, which being refused, this suit was brought.

·The declaration contains the money counts in assumpsit. The plea is the general issue. (Record, 3.)

During the trial of the case in the Circuit Court, a number of exceptions were taken by the defendants to the admission of testimony, objected to by them.

Thus: Sanford, plaintiff's teller, being under examination as a witness, plaintiff asked the following questions, (Record, 8. 9,) "What effect, if any, did the filling up of the check in the name of Epsy, Heidelbach & Co., have upon the examination of the the check? If it lead, in your mind, to any conclusion as to the parties with whom the transaction was made, at the time, state what it was?" To each of which the defendants objected, on account of incompetency; but the objections were overruled, and defendants excepted.

The witness answered, (Record, 9,) "that he supposed Espy was sharp enough to know with whom he was dealing, and that he supposed he was dealing directly with Stall & Meyer," which answer the defendants moved to exclude from the jury as incompetent, and the motion having been overruled, they excepted.

Again, the plaintiff asked Sanford the following question: "When a check of this character is presented by one bank to another, with the request to know whether it is good or not, has this term any special or limited meaning among bankers; if so, to what is it limited or confined? To this question the defendants objected, and the objection having been overruled, excepted. (Record, 9.)

W. A. Goodman, Vice President of the Third National Bank of Cincinnati, also examined as a witness on behalf of the plaintiff, and having testified that he had been a banker in Cincinnati all his life, and was familiar with the customs and usages of banks and bankers there; the plaintiff asked the following question: (Record, 9,) "When a check is sent by a bank, to which it is offered, to the bank upon which it is drawn, to know whether it is good or not, and the answer is, "That is good," or "all right,"—if that answer has acquired any peculiar or limited meaning, state what that meaning is, and to what it is limited? To which question, the defendants objected, on the ground of incompetency, and their objection having been overruled, excepted.

And the witness Goodman, having testified that this language had acquired a peculiar or limited signification, and was understood to refer to the genuiness of the signature, and whether the money was in bank to meet the check; and on cross-examination, that he had never heard the meaning of the terms discussed, or any question made as to the same, or known of any transaction requiring a decision as to their meaning before April 26, 1870, and having further testified that the terms "it is good," or "it is all right; send it through the clearing house," had not acquired any peculiar or limited meaning, the defendants moved to exclude the answer given to the question last aforesaid, as incompetent, and irrelevant, which motion the Court overruled, and the defendants excepted to said overruling. (Record, 9.)

H. B. Bissell was also examined as a witness on behalf of the plaintiff, and having testified that he was a banker of large experience in Cincinnati, and familiar with the customs and usages of bankers in Cincinnati, was asked, by the plaintiff, the following question: "What, if any, custom or usage exists among banks and bankers in Cincinnati as to sending checks presented by a stranger, to the drawer or to the bank on which the check is drawn, for advice as to its value?" To this question the defendants objected because of incompetency, but the Court overruled the objection, and the defendants excepted. (Record, 9.) The witness testified that he could only answer from his own practice, whereupon defendants objected, (Record, 10,) to the witness further answering the question, but the Court permitted him to proceed, to which the defendants excepted.

A number of exceptions were also taken by the defendants, because of instructions asked by the plaintiff and given by the Court, and of instructions asked by the defendants and refused or modified by the Court, and because of alleged errors in the charge. These will be found in the following assignment of errors, specified under Nos. 7 to 24 inclusive.

II.

ASSIGNMENT OF ERRORS.

The Circuit Court erred, as we claim:

1. In permitting the witness Sanford, to answer either of the following questions, notwithstanding defendants' objection; (Record, 8 and 9.) "What effect, if any, did the filling up of the check in the name of Epsy, Heidelbach & Co., have upon the examination of the check? If it lead, in your mind, to any conclusion as to the parties with whom the transaction was made at the time, state what it was?"

2. In overruling the defendant's motion (Record, 9,) to exclude the answer to the foregoing questions, which was: "that he supposed Espy was sharp enough to know with whom he was dealing; and that he supposed he was dealing directly with Stall & Meyer."

3. In permitting the same witness, Sanford, to answer the following question, to which defendants objected; (Record, 9,) "When a check of this character is presented by one bank to another, with the request to know whether it is good or not, has this term any special or limited meaning among bankers; if so, to what is it limited or confined?"

4. In overruling defendants' objection to the following question, put by the plaintiff to the witness Goodman; (Record, 9,) "When a check is sent by a bank, to which it is offered, to the bank upon which it is drawn, to know whether it is good or not, and the answer is, 'that is good,' or 'all right'—if that answer has acquired any peculiar or limited meaning among bankers, state what that meaning is, and to what it is limited?"

5. In overruling defendants' motion, (Record, 9,) to exclude the answer given by the witness Goodman, to said question, which was, that "it had acquired a peculiar or limited meaning and was understood to refer to the genuineness of the signature and whether the money was in bank to meet the check;" who, on cross-examination, having disclosed that he had never heard the subject of the meaning of said terms discussed, or any question made as to the same, or known of any transaction requiring a decision as to their meaning, before April 26, 1870, further testified that the terms, "it is good," or "it is all right;" "send it through the clearing house," had not acquired any peculiar or limited meaning.

6. In overruling defendants' objection to the following question, put by plaintiff to the witness Bissell; (Record, 9 and 10,) "What, if any, custom or usage exists among banks and bankers in Cincinnati, as to sending checks, presented by a stranger, to the drawer, or to the bank on which the check is drawn, for advice as to its value?" after the witness had testified that he "could only answer from his own practice."

7. In giving the *first* charge, asked by plaintiff, as follows; (Record, 10, 14.)

"We ask the court to charge the jury that, if the check in question was originally the check of Stall & Meyer for $26.50, payable to the order of Mrs. E. Hart, and after it was passed from said Stall & Meyer, it was fraudulently raised from a check of $26.50 to a check of $3,920, by the taking out of the original amount and name of the payee, and inserting the name of the defendants as payees, and making it a check for $3,920, and the same was passed to the defendants by the holder so altering it, and the same was so afterwards endorsed by the defendants, and sent through the clearing house so endorsed, and by the operation of the clearing house, was paid by the plaintiffs; and if the plaintiffs, when it was paid, had no knowledge or supposition that it was a raised or altered check, but paid it, supposing it to be a genuine check of Stall & Meyer, for $3,920, and had no good reason to believe otherwise, then the fact that it was drawn upon them, and paid by them, forms no barrier to their recovery, unless they are in some way estopped from setting up such defence."

8. In giving the *second* charge asked by plaintiff, as follows: (Record, 11, 14.)

"That, in order to estop the plaintiffs from a recovery in such case, they must have been guilty of something like fraud or such gross carelessness as amounts to a breach of moral duty; that the fact that the defendants sent the check to the plantiffs' bank, by a messenger, before they took it, and enquired of the paying-teller of the plaintiffs if it was good, and he, after carefully examining it and the state of the account, pronounced it good, or all right; that such fact does not estop the plaintiffs from recovery, if the said teller informed the messenger of the defendants so presenting the check that he was not very well acquainted with their check, and he made a fair and honest examination of the check, and was a skillful teller, and pronounced an honest opinion upon the subject that it was good or all right, the signature being the real signature of Stall & Meyer, and their account on the day being good for that amount —that in such a case, the plaintiffs are not, in law, bound at their peril to know that the check had not been raised or altered in its body, provided it was so skillfully done, that a skillful teller would not be likely to detect such alteration; that while the law, from reasons of public policy, makes a party upon whom a check is drawn responsible for a knowledge of the signature of the drawer, it does not require him to know that a check has been raised, or thus altered in the body of it; and if, after a careful examination of such check, he pays it upon the reasonable belief that it is genuine, then he may recover the same from the party to whom he has paid it, unless guilty of some fraud or gross neglect in relation to the same."

9. In giving the *third* charge asked by plaintiff, as follows: (Record, 11, 14.)

"That if it is not usual or customary for bankers, upon whom checks are drawn, to pass in advance, upon the genuineness of the filling up, and it is impossible for them to detect such alterations, and if, on the other hand, it is usual for them to pass upon the state of the account and the genuineness of the signature to the check, and they have superior and reasonable means of ascertaining such facts, and the signature thereto is genuine, and if the holder in such case requests of the drawee to know whether it is good, and such inquiry may be well understood to relate to the state of the account, and the genuineness of the signature, and is so understood by the bank teller of whom such inquiry is made; and if such teller makes a careful examination of the check, and gives a fair and honest answer, that the check is "good" or "all right," meaning thereby to refer to the state of the account, and the genuineness of the signature, then his answer to such inquiry, that the check is "good" or is "all right," can not be held to be an estoppel to prevent his showing that the check was fraudulently raised or altered, or so as to prevent a recovery of money paid in such case."

10. In giving the *fourth* charge asked by plaintiff, as follows: (Record, 11, 14.)

"That the check being payable to the defendants' order, if the defendants had a large moneyed transaction with the party from whom they received it, the plaintiffs had a right to suppose that the defendants exercised due care and dilligence to ascertain who the party was from whom they obtained it, and how he came by it, before they should endorse it, and if the plaintiffs were in no way connected with the said transaction, and had no interest in it, or knowledge of it, and paid the check solely upon the faith that it was a *bona-fide* check of Stall & Meyer, for the amount so paid, and exercised due care themselves in relation to the check, then, if it be the genuine signature of Stall & Meyer, but a check so skillfully altered, or raised, in the body thereof, that a skillful bank teller could not detect it, then, the facts being shown, the plantiffs may recover the amount so paid."

11. In giving the *seventh* charge asked by plaintiff, as follows: (Record, 12, 14.)

"If the check in suit was originally a genuine check for $26.50, signed by Stall & Meyer, and drawn by them upon the plaintiffs' bank, and payable to the order of one Mrs. E. Hart, and said check was afterwards fraudulently altered by some one unknown from $26.50 to $3,920, and changing the name of the payee from Mrs. E. Hart to the defendants, and so skillfully altered as not to be readily detected, by a careful inspection of the instrument itself, by an experienced bank teller, whose duty it was to examine and pay checks, and if the check thus altered was presented by the defendants to the plaintiffs' teller, who said it was "good" or "all right," and afterwards paid the same through the clearing house to the defendants, the said plaintiffs then believing it to be a genuine check, for said sum of $3,920, then the said plaintiffs are not thereby estopped from recovering back the said money from the defendants."

12. In giving the *eighth* charge asked by plaintiff, as follows: (Record, 12, 14.)

"That a bank upon whom a check is drawn, purporting to be the check of one of its depositors, and which is so skillfully raised or altered that it cannot be detected, is not bound at its peril to know that it is not raised or altered, and if the bank pays such check upon the supposition that it is genuine, it may recover back the money of the party to whom it is paid, as money paid under a mistake of fact."

13. In giving the *ninth* charge asked by plaintiff, as follows: (Record, 12, 14.)

"That the plaintiffs can not be held to guarantee the check, as against a fraud, caused by the erasure and alteration of the body of the check, if neither party had any idea or suspicion of such alteration, and their minds were not directed to it, and no discussion or negotiation was had about it in any way, and no consideration was given therefor."

14. In giving the *tenth* charge asked by plaintiff, as follows: (Record, 13, 14.)

"That the burden of proof is upon the defendants to make out a case of estoppel, and if the evidence is equally divided upon such point, or the jury can not come to any conclusion upon it, the verdict must be against the defendants upon such point."

15, In refusing the *first* charge asked by defendants as follows: (Record, 13, 14.)

"If the jury believe from the evidence that the check in question was sent by defendants to the First National Bank, for information as to its value when presented to them, and before parting with the possession of their bonds and gold, and that defendants' messenger in reply was instructed by the paying teller of the First National Bank, that the check was all right, to send it through the clearing house for payment, or words to that effect, and that, upon the faith of that information, defendants parted with their gold and bonds, received the check in payment thereof, passed the same through the clearing house, and the same was paid by the plaintiff, plaintiff is estopped from claiming that the payment was made by mistake, and cannot recover in this suit even though it appear that, without any connivance of defendants, the check in question had been fraudulently altered from $26.50 to $3,920, before the same was sent to the plaintiff for information as aforesaid."

16. In refusing to give the *second* charge as asked by defendants, as follows: (Record, 13, 14.)

"The rule of law is, that where one of two innocent parties must suffer a loss, he who has exposed the other to the hazard must bear the burden, and if, therefore, the jury find from the testimony that plaintiff and defendants were both innocent of any intention of misleading the other, and that both acted in good faith, and that plaintiff misled defendants by the information communicated to them relative to the check, whereby defendants were induced to part with the posession of their property, plaintiff will not be entitled to recover in this action."

And in giving the same with the following modification: (Record, 13, 14.)

"That the jury must be satisfied that the enquiry of defendants was as to whether the check was good in each and every respect, and that plaintiff so understood it, as applying not only to the signature, and that the amount named in the check stood to the credit of Stall & Meyer, but that it was good in every other respect, and was not a raised check from a small amount to a larger one."

17. In refusing to give the *third* charge as asked by the defendants; (Record, 13, 14.)

"The plaintiff seeks to recover on the ground that the money in dispute was paid by mistake. Now if the jury believe from the evidence that the mistake in question would not have occurred, but for the assurance of the plaintiff's teller, Sanford, to the messenger of the defendants to the effect that the check was good, collect it through the clearing house, and that, upon the faith of this assurance, the defendants took the check and paid for it in gold and bonds, then the plaintiffs themselves contributed to the mistake, and can not recover."

And in giving the same with the following modification: (Record, 14.)

"But the jury must be satisfied that Sanford intended by his answer to the question addressed to him to certify that the check was not a raised one, his reply to the effect that the check was "good: send it through the clearing house," in law being simply a certification that the signature to the check was genuine, and that the amount therein named stood to the credit of the drawers on the books of the bank."

18. In refusing to give the *fifth* charge asked by the defendants, viz: (Record, 13, 14.)

"An inquiry by one banker, being in possession of a check, addressed to another on whom the check was drawn, as to the value of the check, if answered by the proper officer of the latter bank, "It is all right; put it through the clearing house," is a verbal certification of the check, and if the banker, to whom it was addressed, thereupon parted with property on the faith of this certification, and thereby became the owner of the check, the transaction constituted a contract binding the drawee bank, and if at once collected through the clearing house, the money can not be recovered back, if without connivance or knowledge of either banker, the check, before coming into possession of the defendants, had been fraudulently altered by a third person from $26.50 to $3,920."

19. In refusing to give the *sixth* charge asked by the defendants, viz: (Record, 14.)

"That a bank, upon which a check is drawn, is bound, when the check is presented for payment, to know whether it is justly payable or not, and if it pay the amount thereof to a holder, who is innocent of any complicity with, or knowledge of any alteration in the body of the check committed before he became holder, the money can not be recovered back, although, after the check was drawn, it was fraudulently altered so as to change the amount."

20. In refusing to give the *seventh* charge as asked by the defendants, (Record, 14,) as follows:

"That if the jury believe, from the evidence, that the language used by Sanford, the plaintiff's teller, to the defendants' messenger, upon presentation of the check for information of its value; was "It is good; send it through the clearing house," testimony of usage as to the terms "it is good," is not to be regarded by the jury, but the words are to be taken in their ordinary acceptation."

And in giving the same with the following modification: (Record, 14.)

"Which mean that the signature to the check is genuine, and that the bank has funds of the drawer on hand in sufficient amount to meet the check."

21. In refusing to give the *eighth* charge as asked by the defendants, (Record, 14, 15,) as follows:

"If the jury find that the answer of Sanford was to the inquiry of defendants, that the check was good, send it through the clearing house, then said answer amounted in law to a certification of the check that the same was good in law for the amount named in the check as it was when presented to Sanford, and that amount would be paid thereon, when sent through the clearing house."

And in giving the same with the following modification, (Record, 15.)

"That the answer of Sanford, in law, amounted to a certification only that the signature to the check was genuine; that the amount thereof stood to the credit of the drawers on the books of the bank, and that it would be paid when sent through the clearing house if it was genuine in all other respects."

22. In instructing the jury, as follows: (Record, 15, 16.)

"If the defendants, in order to test the genuineness of the signature of the drawers, that they had funds in their hands to meet it, and to test its genuineness in all respects, sent it to the plaintiff for inspection and examination, and the plaintiff, knowing the full extent of the object for which it was sent, sent back the reply that, "It is good, or it is all right," and the defendants relied upon that answer, and were induced to act upon it, and parted with their gold and bonds upon the assurance of the answer, the plaintiff will be estopped from setting up the fact that the check was a raised check."

23. In instructing the jury, as follows: (Record, 15, 16.)

"If the defendants had no suspicion of the check being a raised check, and sent the check to the plaintiffs, for the purpose of examination, without specifying the particulars to which they wished the examination directed, the plaintiff had a right to presume that such examination was desired in relation to such points of which the law presumed them to have knowledge, to-wit: the genuineness of the drawers' signature, and the state of their account; and if, in good faith, they made examination in regard to these points, and they had no knowledge of the raising of the check, or had no particular means, not common to the defendants, of knowing that it had been raised, their answer to the inquiry must be confined to the genuineness of the signature of the drawers and the state of their account, and can not be extended to an as-assurance or guarantee that the check is not a raised check, and plaintiffs are not estopped from setting up such fact."

24. In instructing the jury, as follows: (Record, 15, 16.)

"If the defendants and plaintiffs were mutually ignorant of the fact of the raising of the check, and neither party had any suspicion that it had been so raised, and the parties having within their power equal means of ascertaining that fact, the law did not impose upon the plaintiff, more than upon the defendant, the duty of calling upon the drawers to ascertain whether said check had been so raised, and if the plaintiffs under such circumstances paid the amount of such check to defendants, such payment is not an adoption of the check as genuine, and the plaintiffs are not bound by said payment, and are not estopped from showing that the check was so raised."

ARGUMENT.

I.

As to the admission of incompetent testimony.

This consists of several particulars.

1. It was error to allow the witness, Sanford, to state (Record, 8, 9,) the effect upon his mind of the filling up the check in defendants' name, or any conclusion as to the parties who were dealing with them. As the processes of his mind and his conclusions of fact were not communicated to the defendants, they could not affect the legal relations of the parties."

The first and second assignments are, therefore, well taken.

2. It was error to allow the same witness, Sanford, (Record, 9,)to testify to a peculiar meaning the words "it is good,"or "all right," had acquired among Cincinnati Bankers, by usage. He had himself testified that these were not the words used, and no one pretended to the contrary. Therefore the third assignment of error is well taken.

3. It was error to allow the witness Goodman to testify (Record, 9,) to a peculiar meaning attributed, by usage of Cincinnati Bankers, to the words, "that is good," or "all right;" no one having pretended that those were the words used, and he testifying that the words, which were in fact used, "it is good," or "it is all right; send it through the clearing house," had not acquired a peculiar meaning, and further, that before the day of the transaction in controversy, April 26, 1870, he had never known of a transaction requiring a decision as to the meaning of the words "it is good," or "all right," and had never heard their meaning discussed, or any question made as to the same; (Record, 9.) Therefore the fourth and fifth assignments of error are well taken.

4. It was error to allow the witness Bissell to testify as to the usage of Cincinnati Bankers, after he had disclosed "that he could only answer from his own practice;" (Record, 9, 10.) His practice did not tend to prove usage, and his confession ought to have excluded him, for it was equivalent to saying that he was not aware of any such usage.

II.

As to the legal effect of the words used by plaintiff's teller to the defendants' messenger.

There was, substantially, no controversy as to what the transaction was, the only dispute being, whether Schnarrenberger, defendants' messenger, told Sanford, plaintiff's teller, to examine carefully, because the check was presented by a stranger, (Record, 8,) or whether Sanford, believing, as he testified, (Record, 9,) that Espy was "dealing directly with Stall & Meyer," nevertheless, told Schnarrenberger, (Record, 8,) that "if said check was offered by a stranger, he would advise them to have nothing to do with him, that he would be careful and not pay so large a check to a stranger no matter how good looking he was."

Both parties agreed that the check was shown to Sanford, that he was the proper officer to certify checks, or furnish information of their value; that he knew it was offered to Espy, Heidelbach, & Co., and that the offer was pending and undetermined, awaiting his reply; that he examined the check, and said, with the design of having the statement repeated to Jenney, defendants' teller, and that he should act upon it, "it is good," or "all right," "send," or "put it through the clearing house," (Record 8,) or as Sanford stated it, "the check is good. or all right, send it through the clearing house."

1. *These words constituted a verbal certification, equivalent in law to a written certification of the check.*

It was not denied by the District Judge, Swing, to whom, with a jury, this case was tried in the Circuit Court, in the absence of Judge Emmons, that a verbal certification is equally valid, and has the same effect as a written certification, and he gave this to the jury in the fourth charge asked by the defendants. (Record, 13.)

But he deprived this statement of all value, and reduced it to the definition of an abstract proposition, unnecessary to the case, by also instructing the jury, in modification of the eighth charge asked by us, "that the answer of Sanford, in law, amounted to a certification only that the signature to the check was genuine, that the amount thereof stood to the credit of the drawers on the books of the bank, and that it would be paid when sent through the clearing house, if it was genuine in all other respects."

It may be, that the judge, by this language, also defined what, in his opinion. would have been the effect of a written certification. We shall, however, endeavor to show that a written certification, like the acceptance of a bill of exchange, imports an obligation to pay the very check certified, and precludes the defence of alteration before acceptance or certification.

The usual method of certifying in writing, by the First National Bank of Cincinnati, is shown to have been by writing "good" for the amount, stating it, which was then signed by the initials of the teller. (Record, 6.) Thus, in this case, had Schnarrenberger been told by Jenney, to bring back the check certified, he would have said to Mr. Sanford, "please certify it in writing," and Sanford would at once have written, "good for $3,920, W. H. S.," across the face of the check.

Similar to this, is the usual method of certifying checks, in other banks. *Morse on Banking*, 190, says: "The most common form in which to express the certification is by simply writing upon the check, the word "good," followed by the initials of the certifying officer. But it is not essential that this form should be observed. Any other writing, as the name or initials of the officer or the word "good," alone, if intended and understood to bear this meaning, will be construed accordingly. In England the "marked checks," which, in some respects, though not in all, resembled our certified checks, were customarily, until the the statute interfered, literally only marked, and bore no written word whatever."

In the case of *Merchants Bank* vs. *State Bank*, 10 Wall, 604, the form of certification adopted, was, "Good, C. H. Smith, Cashier." (p. 610.)

In *Meads, Receiver, &c.* vs. *The Merchants Bank of Albany*, 25 N. Y., 143, the form adopted, was, "good, Kirtland, teller."

Not only is the form of words thus used for written certification, almost identical with those addressed by Sanford, the plaintiff's, to the defendants' messenger in the present case, but to do with him, that he would be careful and not pay so large a check to a stranger no matter how good looking he was."

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It may be, that the judge, by this language, also defined what, in his opinion. would have been the effect of a written certification. We shall, however, endeavor to show that a written certification, like the acceptance of a bill of exchange, imports an obligation to pay the very check certified, and precludes the defence of alteration before acceptance or certification.

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Not only is the form of words thus used for written certification, almost identical with those addressed by Sanford, the plaintiff's, to the defendants' messenger in the present case, but in substance and essential meaning, it is quite the same. Both the written and spoken phrase assures the holder that the check, in the form in which it then appears, is good, and will be paid to the holder on presentation. It is an engagement by the bank, upon which will rest the duty of paying the check, that it will comply therewith. "By the law merchant of this country, the certificate of the bank *that a check is good*, is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then, and shall continue good."

Merchants Bank vs. *State Bank*, 10 Wallace, 647–8.

Wherein does, or can the written "certificate of the bank that a check is good," differ, in legal effect, from the same certificate by parol? The form of words is the same; the consideration the same; the intent and meaning the same. The difference is practical, not in legal effect, and is this only, that *litera scripta manet*, and confirms the obligation wheresoever it goes; thus enabling successive holders to use the check "as money," while the spoken word, although an assurance of equal legal value with him to whom it was addressed, depends upon memory for its preservation, and verbal repetition from holder to holder to constitute, practically, a continuing acceptance of the check.

The authorities concur in holding a verbal certification equivalent to a written, or to acceptance.

Thus in *Barnet* vs. *Smith*, 10 Foster, 256, the Court, after reviewing, the decided cases, concluded, (p. 266); "Upon the doctrine of these authorities it would seem, that the presentment of this check to the cashier of the bank, and his statement that it was "good," would amount in law, to an acceptance." The principle .involved, is stated thus: (p. 265.) "In general, as no formal act is required to constitute a simple contract, and any mode which demonstrates an intention to become bound by it, will have an obligatory force upon the contracting party, so any act of a drawee or acceptor, which evinces a consent to comply with the request of the drawer, will constitute an acceptance."

So in England, as shown by *Robson, et al.*, vs. *Bennett, et al.*, 2 Taunton, 389, it was "customary among bankers in London, in their dealings with each other, not to pay any check, which is presented by, or on the behalf of another banker, after 4 o'clock in the afternoon; *but merely to give an answer to the person so presenting it, whether it is a good check or not*; and in case the check is approved, a mark is made on it, *either by the person presenting it* or the person who gives the answer." "Such a marking, under this practice, amounts to an acceptance, payable next day, at the clearing house;" (Syllabus, p. 388.) And the reason given by Sir James Mansfield, C. J., p. 396, is, "The effect of that marking is similar to the accepting of a bill; for he admits hereby assets, and makes himself liable to pay;" and after describing the custom, he adds; "therefore it is the same thing as if a banker had written on a check, "We pay this, to-morrow, at the clearing house."

This being so, what can "the check is good, or all right, send it through the clearing house," mean, other than a promise to pay the check when presented at the clearing house?

"In the next place," says Judge Story, (*Bills of Exchange*, § 242,) "an acceptance may, unless otherwise qualified or restrained, (as by the local law of the place of acceptance,) be either verbal or in writing." There is no statute in Ohio requiring acceptances to be in writing.

See also, 3 *Kent Comm.*, 83, where Chancellor Kent says: "Though a bill comes into the hands of a person with parol acceptance, and he takes it in ignorance of such acceptance, he may avail himself of it afterwards."

In *Howland & Aspinwall*, vs. *Carson & Newbold*, 15 Penn'a St. 453, the distinction was taken, that the parol acceptance does not necessarily enure to the benefit of a purchaser, unless there had been an obligation to accept the bill, as because of funds of the drawer, on hand. But tha. it does operate as an acceptance in his favor if he purchased on the promise to accept.

The earlier English authorities attribute the same result, viz: of virtual acceptance, even to a letter written before the drawing of the bill, if "accompanied with circumstances which may induce a third person to take the bill by indorsement." Lord Mansfield, in *Pierson* vs. *Dunlop*, 2 Cowper, 571. In *Coolidge, et al.*, vs. *Payson, et al.*, 2 Wheat, 66, the same rule was adopted, and has ever since been the law of this Court. "Upon a review of the cases which are reported," says C. J. Marshall, p. 75, "this Court is of opinion, that a letter written within a reasonable time before, or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise,"

See also *Schimmelpennick, et al.*, vs. *Bayard, et al.*, 1 Pet. 264, *Townsley* vs. *Sumrall*, 2 Do, 170; *Boyce, et al.*, vs. *Edwards*, 4 Do, 111.

In *Townsley* vs. *Sumrall*, the principle is stated in terms which forcibly apply to the case at bar. "If a person undertake, says Mr. Justice Story, on p. 180, "in consideration that another will purchase a bill already drawn, or to be thereafter drawn, and as an inducement to the purchaser to accept it, and the bill is drawn and purchased on the credit of such promise for a sufficient consideration, such promise to accept is binding upon the party. It is an original promise to the purchaser, not merely a promise for the debt of another; and having a sufficient consideration to support it, in reason and justice, as well as in law, it ought to bind him. It is of no consequence that the direct consideration moves to a third person, as in this case to the drawer of the bill; for it moves from the purchaser, and is his inducement for taking the bill. He pays his money upon the faith of it, and is entitled to claim a fulfillment of it."

Thus, in the case at bar, if Sanford supposed the check was offered to the defendants, by a stranger, and cautioned the defendants' messenger, as he says, on that account, then his assurance, "the check is good, or all right, send it through the clearing house," was an original promise, supported by the consideration moving from the purchasers, the defendants, who paid their money upon the faith of it, and are entitled to claim a fulfillment of it, in reason and justice, as well as in law.

A test of the liability of the plaintiff, for such representation and whether it is equivalent to a written certification, will be furnished, if we inquire what would have been the relations of the parties, had Stall & Meyer, on the day of the date of the check, April 26, 1870, and before the hour of its presentation at the clearing house, by other checks actually presented to, and paid by the bank, drawn out the entire sum to their credit. Could the First National Bank escape liability by saying "this check was good when shown to our teller, it became worthless by the act of Stall & Meyer, afterwards?"

Were they not as much bound, after saying, "The check is good, send it through the clearing house," to retain the sum it appropriated, and not pay it on any other check of the drawer, as if they had certified in writing.

The answer is obvious; by saying, "the check is good; send it through the clearing house," they not only assured the defendants that the check was *then* good; that there was *then* a sufficient sum to the credit of Stall & Meyer to meet it, but that it should remain good; that the necessary amount should be withdrawn from the control of Stall & Meyer, to meet this check when presented at the clearing house.

And this would have been the precise effect of a written cerfication, so that they are one and the same thing. *Merchants Bank* vs. *State Bank*, 10 Wall, 648.

2. *Being equivalent to a written certification, they constitute an original obligation, in the nature of an acceptance, which the certifying bank must comply with by payment, and cannot recover back after payment.*

"It" (the certification of a check,) "is an undertaking that the check is good then, and shall continue good, and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume. The object of certifying a check as regards both parties, is to enable the holder to use it as money, The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available also to him for all the purposes of money. Thus it continues to perform its important functions until in the course of business it goes back to the bank for redemption, and is extinguished by payment." *Merchants' Bank* vs. *State Bank*, 10 Wall, 648.

This authority is of course conclusive, but we may be pardoned if we continue our citations to show how fully, in this regard, it is in accord with the other decisions.

"The certification, by an authorized agent, of a negotiable check drawn upon a banking company, is equivalent to the acceptance of a bill of exchange, and imposes upon the bank an obligation to pay the amount for which the check is drawn, to the holder, upon demand, at any time before the statute of limitations attaches." *Farmers' & Mechanics' Bank* vs. *Butchers' & Drovers' Bank*, 16 N. Y. 125.

"A customer, who deposits money, requires a certificate or a draft, or a check to be certified. These are all contracts. A certificate is a promissory note; a draft is nothing else than a bill of exchange; and the usual certification written upon a customers check is equivalent to an acceptance and undertaking to pay, on which the bank is liable." *Barnes* vs. *Ontario Bank*, 19 N. Y. 159.

"The certification of a check as good by the authorized officer of a bank is equivalent to the acceptance of a bill of exchange payable on demand, and makes the bank primarily liable to the holder until discharged by payment, release, or the statute of limitation." *Meads, Receiver, &c.*, vs. *Merchants' Bank of Albany*, 25 N. Y. 143.

"When a check, payable to bearer or order, is presented with a view to its being marked "good," and is so certified, the sum mentioned in it must necessarily cease to stand to the credit of the depositor. It thenceforth passes to the credit of the holder of the check, and is specifically appropriated to pay it when presented, and as the purpose of having it so certified is not to obtain payment, but to continue with the bank the custody of the money, the holder can have no greater rights than those of any other depositor. Certainly he has no right of action until payment has been actually demanded and refused. That he stands on the footing of an ordinary depositor, is the doctrine of *Willetts* vs. *The Phœnix Bank*, 2 Duer, 121. In that case, it was said by Chief Justice Oakley, "It is the duty of the officer certifying a check, to cause it to be immediately charged as paid in the account of the drawer, and, when this is done, the sum thus charged will remain as a deposit in the bank to the credit of the check, and be forever withdrawn from the control of the maker, except as a holder of the check Such a deposit stands exactly upon the same ground as any other. The bank, instead of being prejudiced, is benefitted by the delay of the owner in calling for its payment, and can with no more propriety impute laches to the unknown holder of the check, than to a known holder of an ordinary deposit." Marking a check "good" was held to be an unconditional engagement to hold a sufficient amount of the funds of the drawer to meet the check whenever, it should be presented for payment, *The Farmers' & Mechanics' Bank* vs. *Butchers' & Drovers' Bank*, 4 Duer, 219, is to the effect. The doctrine is sound." *The Girard Bank* vs. *The Bank of Penn Township.*, 39 Penn. St. 92.

See also, *Bickford* vs. *First National Bank of Chicago*, 42 Ill. 238; *Brown* vs. *Leckie, et al.*, 43 Do. 497; *Clarke National Bank* vs. *Bank of Albion*, 52 Barb. 599; *Salt Springs Bank* vs. *Syracuse Saving Institution*, 62 Do. 108–9.

3. *And the certifying bank cannot escape its duty of payment, or, having paid, recover back the money, under pretence of a fraudulent alteration of the check before certification.*

Alteration *after* execution will discharge the maker or other party to a promissory note, bill of exchange, or check. But alteration *before* execution is quite different. The duty is imposed upon all parties to negotiable paper to know what they are doing, when they give their names to it. As was said in *Brown* vs. *Leckie, et al, supra*, certifying is lending to the check, "the credit of the drawee." Before the drawee takes this responsibility, he should be sure that he is willing to assume the position, and able to meet its engagements. His certificate is a promise to pay the amount named in the check as it was when certified, no other.

In *Sanderson* vs. *Collman*, 4 Mann. and Gr. 218. Tindal, C. J., says: "The first point in this case is whether the drawee, after accepting and thereby giving an apparent validity to a bill, has a right in an action against him as acceptor to set up as a defence that the name of the drawer was forged, *or other matter invalidating the bill.* And it appears to me that he has no such right,"

Langton vs. *Lazarus*, 5 M. and W. 629. "Assumpsit by the endorsee against the acceptor of a bill of exchange, plea that before the bill became due, and whilst it was 'in full force and effect,' the date of it was altered by the drawer, whereby it became void: *Held*, that the plea was bad, because it did not allege the alteration to have been made *after* acceptance."

Ware vs. *Allen*, 2 Metc, 53. "It is no defence to an action by a *bona fide* holder of a bill of exchange against the acceptor, that the bill was fraudulently altered before acceptance. A bill of exchange, payable in three days, was indorsed by the payee for the accomodation of the drawer who altered it to thirty days and put it into circulation. On discovering the alteration, the holder, and the payee who had indorsed it, made an arrangement with the drawer, by which the payee gave security to the holder for half the amount of the bill, and the drawer gave security to the holder for the balance, and the bill was returned to the payee; the payee thereupon presented the bill to the drawee, without disclosing to him the alteration or the said arrangement with the drawer, and read it to him as it was altered, and the drawee said it was correct and should be paid. *Held* that the drawee was bound by this acceptance."

It seems clear from these considerations and authorities, that the theory of law applied to the case by the court below was founded in error. The larger number of our assignments of error is, therefore, well taken. We call particular attention, however, to the eleventh, twenty-first, twenty-third and twenty-fourth assignments of error.

III.

As to the plaintiff's supposed right to recover for money paid by mistake.

It is obvious that this right does not extend to every case of of mistake. Money paid by mistake of *law* can not be recovered back; nor can money paid, even if it were by mistake of *fact*, upon a consideration, except in the limited class of cases in in which the case is one of or equivalent to the rescission of an agreement, and the parties can be restored to *statu quo*.

At law, the right to recover money paid by mistake is limited to the cases where no consideration passed.

The declaration is, therefore, in such cases ordinarily confined to the money counts. The money was either had and received by the defendant for the use of the plaintiff; or paid, laid out and expended by the plaintiff for the use of the defendant; or lent, or advanced by the plaintiff to the defendant. The want of consideration prevents the legal title to the money passing to the defendant, even though voluntarily delivered, for the mistake refutes the theory of gift.

The money which can be recovered, as paid upon a mistake, is money not due. The mistake must be in respect to facts which "disentitled the defendant to receive it." *Kelly* vs. *Solari*, 9 M. and W. 53.

Thus, in *Ellis & Morton* vs. *Ohio Life Insurance & Trust Co.*, 4 Ohio St. 628, the syllabus, which in Ohio is the only authoritative expression of the judgment of the Supreme Court, contains the following clear statement of the principle: "Money paid upon a mistake of facts, *and without consideration*, may, as a general rule, be recovered back."

So in Missouri, *Koontz* vs. *Central National Bank*, 51 Missouri, 279, it is said, "They have obtained the money without consideration, not as a gift, but under a mistake."

We are relieved, however, from any extended citation of authorities, by the clear exposition of the law, contained in the decision in *Hoffman, et al.* vs. *Bank of Milwaukee*, 12 Wall. 181. "Money paid under a mistake of facts," says Mr. Justice Clifford, pronouncing the opinion of the court, on page 189, "it is said, may be recovered back *as having been paid without consideration.*"

In the case at bar, the consideration consisted of the detriment to the defendant in receiving the check, and delivering the gold and bonds, upon the faith of plaintiff's representation that the check was good, and its promise to pay at the clearing house, *Townsley* vs. *Sumrall*, 2 Peters, 180; *Hoffman, et al.*, vs. *Bank of Milwaukee*, 12 Wall. 191.

Courts of law have no power to dissolve contracts; it is only where from want of consideration or fraud, it can be truly said that there was in law no contract, that the money paid, or the property delivered, or the land conveyed, may be recovered in an action of assumpsit, replevin, or ejectment. It is in equity, where there is power to prescribe terms of rescission, that mistakes in contracts supported by considerations are corrected.

Here the check was made payable to the defendants; the defendants presented it for acceptance, and it was verbally accepted, and afterwards paid. The contract was directly between plaintiff and defendants, and the acceptance or promise to pay at the clearing house was not *nudum pactum*, but supported by the consideration that the defendants received the check on the faith of it.

In *Clements* vs. *Loggins*, 2 Ala. 519, the Court say: "But if the note be purchased on the faith of a promise by the maker to pay it, he will be compelled to pay the assignee at all events, on the ground of a contract of which the purchase of the note would be a sufficient consideration."

In equity, a complainant seeking to set aside and cancel a transaction, and recover moneys paid or other property transferred or conveyed, can succeed only on condition that he replace the defendant in *statu quo*, by returning him the consideration he parted with. If part of this consideration consists of money paid at the complainant's instance to a third person, that money must be restored, as a condition of decree.

This rule is recognized even at law, in Pennsylvania. Chief Justice Gibson in *Boas* vs. *Updegrove*, 5 Barr, 518, states it thus: "Again, money voluntarily paid by mistake cannot be recovered back where the parties cannot be placed in *statu quo;* for where the blunder necessarily imposes a loss on some one, it must be borne by the author of it."

Who was the author? Certainly no one but the plaintiff, whose teller after careful inspection of the check, replied, "The check is good, or all right, send it through the clearing house." Upon the faith of this representation and promise the defendants parted with their gold and bonds. Return the value of this gold and bonds, or cease to press for a rescission of the dealings between the parties.

Merely returning the check would not be restoration to *statu quo*. For the dealings between the parties did not begin with the presentation of the check for payment, but with the presentation for acceptance. The defendants had not then purchased the check. The plaintiff knew that they were dealing for it and that they desired information in order to judge whether to take it or not. "Take it," said the teller, (for this is what his language fairly imported,) "You will be safe; the check is all right, we will pay it at the clearing house." "The check is good," or "the check is all right," he said, not that it was good as to the signature and amount merely, but "good;" "*all* right," not merely partly right, and "we promise to pay it."

In *Hoffman & Co.* vs. *Bank of Milwaukee*, a recovery was claimed on the ground that the forged bills of lading were attached to the bills of exchange, and that the acceptance was therefore made in the faith of their genuineness. But Mr. Justice Clifford expressly says, (page 189,) "nor is it pretended that they made any representation upon the subject to induce the plaintiffs to contract any such liability." Nor were any made in the case at bar by the defendants. What they did, really amounted to a warning to the plaintiff not to accept, consisting as it did, of an inquiry, which implied a doubt of the value, of the check. The representation was by the plaintiff. And the reply, reassuring the doubting defendants, and promising to pay at the clearing house, followed by the receipt of the check and delivery of gold and bonds on the credit of the promise, constitutes a consideration advanced by the defendants at the instance of the plaintiff, which must be repaid, or the *status quo* will not be restored.

Concede that it was a blunder, that both parties were equally ignorant, and that neither of them suspected, or could have discovered it was a raised check, the first blunderer was the plaintiff, and therefore it was in law the author of the blunder.

The same principle was recognized and enforced in the *Irving Bank* vs. *Wetherald*, 36 N. Y., 335. There it was decided, that although the customary certificate "good," by a bank, at which a note is made payable, is information merely that the maker has funds there to meet the note, yet if acted upon, the certifying bank will be estopped to deny its truth, unless the error is discovered and notice given to the presenting bank, in time to make a re-presentment and charge the indorsers. The right, in other words, to refuse to make the assurance true, depends upon the power to restore to the *status quo*.

IV.

The plaintiff is estopped to dispute its liability upon the acceptance.

Speaking strictly, the term "estopped" may be open to objections, as not descriptive of the effect of the plaintiff's promise to pay the check when presented at the clearing house. As the teller made both a representation and promise the discussion would seem as well to relate to the law which prevents escape from the obligation of a contract supported by a consideration, and we have so considered it in the preceding portion of this argument. But as the teller made a representation, to induce the defendants to act, as well as a promise, and as cases of action induced by promise may be and often are treated as decided by the law of estoppel, it will be convenient so to consider this case. But even if the Court should be of opinion, as Judge Swing was, (Record, 10 and 11), that, to constitute a true estoppel, there must be knowledge of the falsehood of the statement when made, it must not be forgotten, that such a rule does not necessarily apply to an estoppel of the kind now under consideration. The estoppel which prevents breach of a promise may be much stronger than the estoppel which forbids dispute of a statement.

A case quite similar to that under discussion was disposed of in Alabama by the principle of estoppel. *Brooks* vs. *Martin*, 43 Ala. 360. "If the maker of a promissory note tells one seeking to trade for it, and desirous to know if he has any defence against it, that it is "all right," he will not be permitted afterwards to dispute this admission when sued on the note by the party to whom the admission was made. This is such an admission as estops the maker from denying that the note is all right, if the facts upon which the subsequent defence is rested, existed at the time of making such admission."

"Such admission is good against the maker of the note if it be negotiable, and not due and unprotested, whether it be false or true, or fraudulent or innocent, if it be so made as to have a tendency to mislead or deceive, and does have this effect."

The principle of estoppel in *pais* was thus stated by Lord Denman in *Pickard* vs. *Sears*, 6 Ad. and E., 475: "Where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

The word "wilfully" as here used has since been construed to mean "voluntarily:" *Cornish* vs. *Abington*, 4 H. and N., 549.

In *Dezell* vs. *Odell*, 3 Hill, 215, the principle is stated thus: I. "That to estop a party it must appear, that he has made an admission which is clearly inconsistent with the evidence he proposes to give: 2. That the other party has acted upon the admission: 3. That the latter will be injured by allowing the truth of the admission to be disproved."

This statement of the law was approved by the Supreme Court of Pennsylvania, in *Eldred* vs. *Hazlett's Administrator*, 33 Penn. St. 319.

And in *Weaver* vs. *Lynch*, 25 Penn. St. 451, it was held to be "a well settled principle of law that if an obligor induce a person to take an assignment of his bond, by admitting the justice of the debt or declaring that he has no defence, he can not afterwards deny it to the prejudice of the assignee. In order to create an equitable estoppel upon the obligor, it is necessary for the assignee to prove, not only that he took the assignment, but that he paid a valuable consideration for it. The holder must also prove that the admission of the obligor was made before the assignee expended his money in purchasing the bond."

In none of these cases is knowledge of its falsehood, at the time, by the party making the admission, incorporated into the rule, as an essential element.

In *Freeman* vs. *Cooke*, 2 Exch., 654, Baron Parke says, referring to *Pickard* vs. *Sears*, "By the term 'wilfully,' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth."

Certainly Sanford so conducted himself that Jenney, defendants' teller, as a reasonable man, would take the representation to be true, that the check was good or all right, and that it would be paid at the clearing house, and would believe that it was meant that he should act upon it; and he did act upon it as true. He certainly could not suppose that the check was not to stay paid, but might be collected back; and in the absence of a usage attaching a local or customary meaning to the words, they must be understood in their ordinary signification, as importing that the check was all right or good, and would remain good, and an obligation to pay at the clearing house, with a promise to meet and discharge the obligation. It could not import an obligation to pay, with the reservation of a right to undo the payment, and recover back.

In *Jordan* vs. *Money*, 5 H. L. Cases, on page 212, Lord Chancellor Cranworth, in explicit terms, repudiated this interpolation into the rule, saying: "Nay more, I think that the principle has been carried, and may be carried, much further; because I think it is not necessary that the party making the representation should know that it was false; no fraud need have been intended at the time. But if the party has unwittingly misled another, you must add that he has misled another under such circumstances that he had reasonable ground for supposing that the person whom he was misleading was to act upon what he was saying."

This clear expression of opinion derives added force from the fact that Lord Cranworth, when Baron Rolfe, was one of the Barons of the Exchequer, who took an active part in the long controversy between the Queen's Bench and Exchequer Courts, on the question whether turpitude, or knowledge of the falsity of the statement, or a purpose to deceive is essential in actions of *deceit*, and was one of the judges sitting in the Exchequer Chamber, and concurring in the final and decisive judgment, by which the puisne Barons of the Exchequer were sustained in holding moral fraud essential to the action on the case for deceit, and the opinions of the Queen's Bench and of Lord Abinger as C. B. of the Exchequer, were overruled, in *Collins et al.*, vs. *Evans et al.*, 5 Ad. & E. (N. S.) 820.

But this is limited and that reasonably, to the action on the case for *damages*, suffered by deceit. It does not extend to a rescission in equity, where the *status quo* must be restored as condition precedent to relief, nor to an estoppel. In equity, it has always been held that a misrepresentation, however, innocent or inadvertent, is sufficient reason for exercising the remedy of rescission, if the parties can be placed in *statu quo.*

Judge Story, in 1 Eq. Jur. § 193, states the rule in equity thus; "And even if the party innocently misrepresents a material fact by mistake, it is equally conclusive; for it operates as a surprise and imposition upon the other party."

And in *Buchanan et al.*, vs. *Moore*, 13 S. & R. 306, Judge Gibson thus clearly enunciates the principle: "If, by reason of the defendant's declarations at the sale, the plaintiff was induced to purchase under a belief that it was included: although the Sheriff's deed would not convey the legal title, yet his purchase would give him an equity which Chancery would render effectual, by decreeing a conveyance; and this whether such declarations proceeded from design, *or a misapprehension of the fact.* If both were equally innocent, a loss in consequence of the acts or declarations of the one, ought not to be borne by the other."

We ought ourselves to be estopped against ever speaking again of "*equitable* estoppels," if an innocent misrepresentation, when acted upon to the prejudice of another fails to create an estoppel so as to fix the relations of the parties, in a case where the party making the misstatement seeks to disturb them. It would be equivalent to saying that the same condition of facts upon which the Chancellor will administer relief in favor of a complainant, can not be asserted as a defence by a defendant.

In Ohio, the opinion that knowledge, or fraudulent purpose is essential to constitute an equitable estoppel, does not now prevail. Thus, it was decided, as we learn from the *syllabus*, in the case of *Beardsley* vs. *Foot*, 14 Ohio St., 414, that; "Admissions in *pais*, although made in good faith, may yet be made under such circumstances as to operate by way of estoppel, and preclude the party from afterwards gainsaying them."

So also in *Adams & Co.*, vs. *Brown, et al.*, 16 Ohio St. 75.. "Where a company so uses or adopts the name of another company composed mainly of the same individuals, as reasonably to induce the belief that they are one and the same company, it will be bound by contracts made by a common agent of the two, with parties acting in such belief, although made in the name of the other company, and in a matter pertaining to its business alone.

Beardsley vs. *Foot* presents circumstances, in principle not unlike those now under consideration. Foot had bought land from Garrett on the faith of Beardsley's statement that he held no incumbrances upon the premises. It was decided that Beardsley was estopped to set up judgments he then held against Garrett, although he made the representation in good faith, and in forgetfulness of his judgments, at a time when his attention was engrossed by other business.

We suppose that the rule adopted by the Supreme Court of Ohio will be followed in this case. The parties are residents of Ohio, and it would be singular indeed if the fact that suit was brought in the Circuit Court justified a different construction of their acts, from that adopted in case of litigation in the State courts.

But we suppose the rule in the federal courts is the same. In *Swain* vs. *Seamens*, 9 Wall., on p. 274, Mr. Justice Clifford concludes the opinion of the court thus: "Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim."

If this be true of conduct, tacit encouragement, how much more when reliance has been placed on a positive statement. *Vanderpool, et al.*, vs. *Brake*, 28 Ind., 130; *McCabe* vs. *Raney*, 32 Ind., 309; *Horn* vs. *Cole, et al.*, 51 N. H., 287; *Roe* vs. *Jerome*, 18 Conn., 138.

And in Alabama, where knowledge was once held an essential element of an estoppel, and that a party to a note inquired of, by one desiring to purchase, whether he has any defence, and answering that he has none, was not precluded thereby from asserting a defence of which he had then no knowledge, it was also decided that "if, when so inquired of, he promise to pay it, if purchased, he will be compelled to pay it at all events. *Clements* vs. *Loggins*, 2 Ala., 514; *Lanier* vs. *Hill*, 25 Ala., 554; *Drake* vs. *Foster*, 28 Ala., 650; *Plant* vs. *Voegelin*, 30 Ala., 160.

Under any other view than the one we take, the transaction between the two banks prior to the receipt of the check by

Jenney, had no other significance than the payment itself, and the parties stand now in the same legal position, and occupy the same relations to each other as if there had been no such transaction at all, and the defendants had taken and collected the check without any previous assurance of its validity or promise to pay by the plaintiff. The payment alone was a guarantee of the genuineness of the signature of Stall & Meyer, and the extent of their credit with the plaintiff. And yet, although they were in fact induced to accept the check by the assurances of the plaintiff, they do not, as is said by our learned antagonists, and by Judge Swing, to-day occupy any better position than if they had taken it upon their own knowledge of the signature and credit of the drawers, without such assurances.

" Wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. Ashhurst, J. in *Lickbarrow* vs. *Mason*, 2 Term 70. Admit that both were equally innocent, equally diligent, yet one must suffer. Which ought it, in justice, to be? Had Sanford refused to answer, or said, "Inquire of Stall & Meyer," or," The amount stands to their credit, and the signature is genuine," there would have been no dispute, He chose not thus to limit his assurance, but preferred rather the enlarged statement, "the check is good;" not " the signature and amount," but " the *check* is good, or *all* right, send it through the clearing house." Thus he created the possibility of injury, giving to the stranger the opportunity of fraud, and his principal should bear the loss.

For these reasons it seems to us that the eighth, ninth, tenth, eleventh, fifteenth, sixteenth and seventeenth assignments of error are all well taken.

We have argued this case upon the hypothesis that this court would agree with the courts of New York and California, in holding that a bank paying, without other circumstances, a raised check, may recover back the money, as having been paid by mistake without consideration. The nineteenth assignment of error, however, presents the question, and we submit it to the consideration of your Honors.

We respectfully submit that the defendants, now plaintiffs in error, are entitled to a reversal of the judgment and the award of a *venire facias de novo*.

GEO. HOADLY,
EDGAR M. JOHNSON,
Of Counsel for Plaintiffs in Error.

Cincinnati, November 22, 1873.

Robert Clarke & Co., Prs., 65 West Fourth St., Cin., O. [*Jan. 1874.*

Supreme Court of the United States.

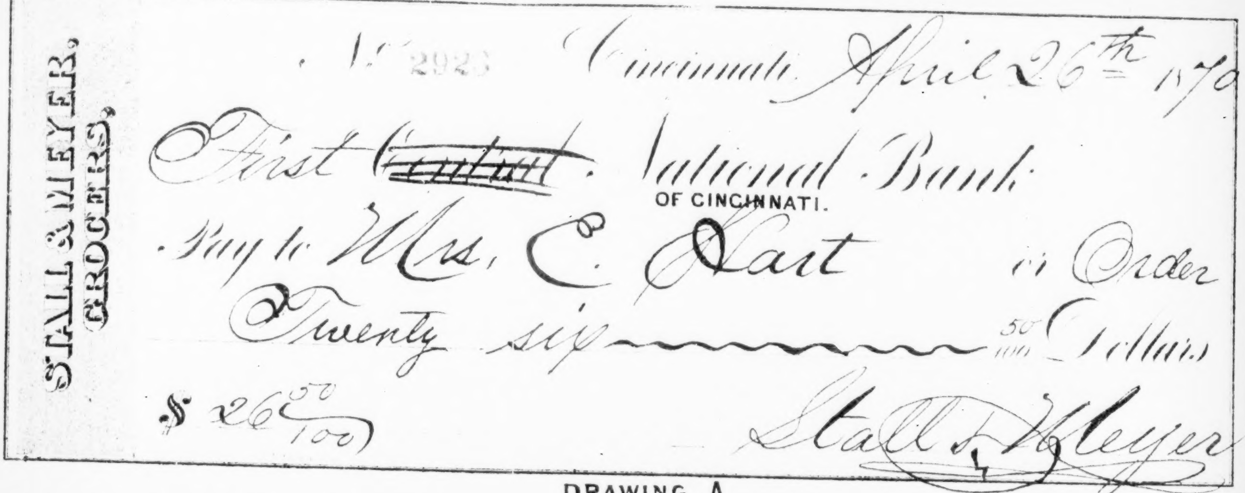
First National Bank of Cincinnati

195.] vs. ads

Espy, Heidlebach & Co.

Error to the Circuit Court of the United States for the Southern District of Ohio.

T. D. LINCOLN,
Of Counsel for Defendants in Error.



STALL & MEYER,
GROCERS,

No. 2923 Cincinnati April 26th 1870

First ~~Central~~ National Bank
OF CINCINNATI.

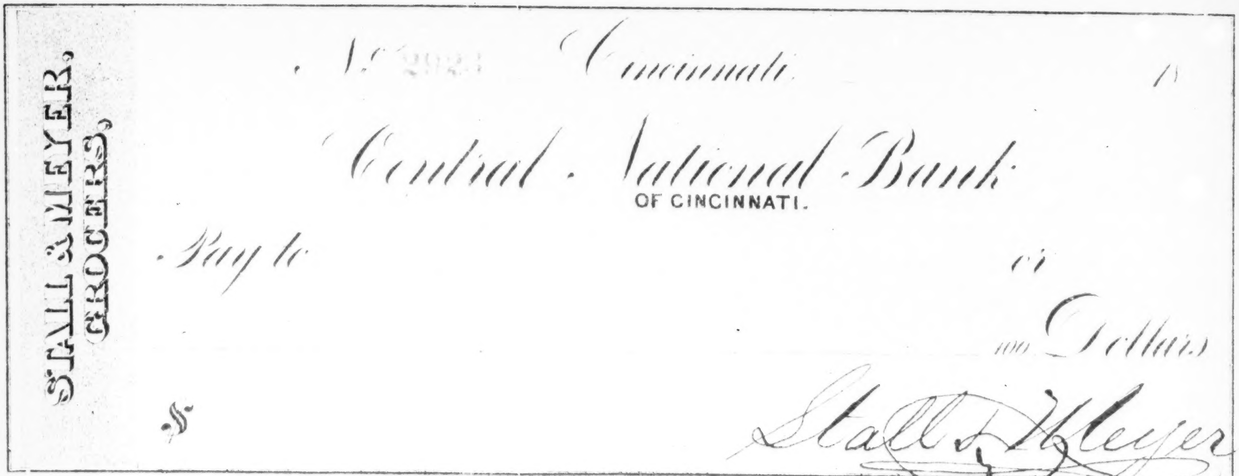
Pay to Mrs. E. Hart or Order

Twenty six $\frac{50}{100}$ Dollars

\$ 26 $\frac{50}{100}$

Stall & Meyer

DRAWING A.



STALL & MEYER,
GROCERS,

No. 2923 Cincinnati 18

Central National Bank
OF CINCINNATI.

Pay to or

100 Dollars

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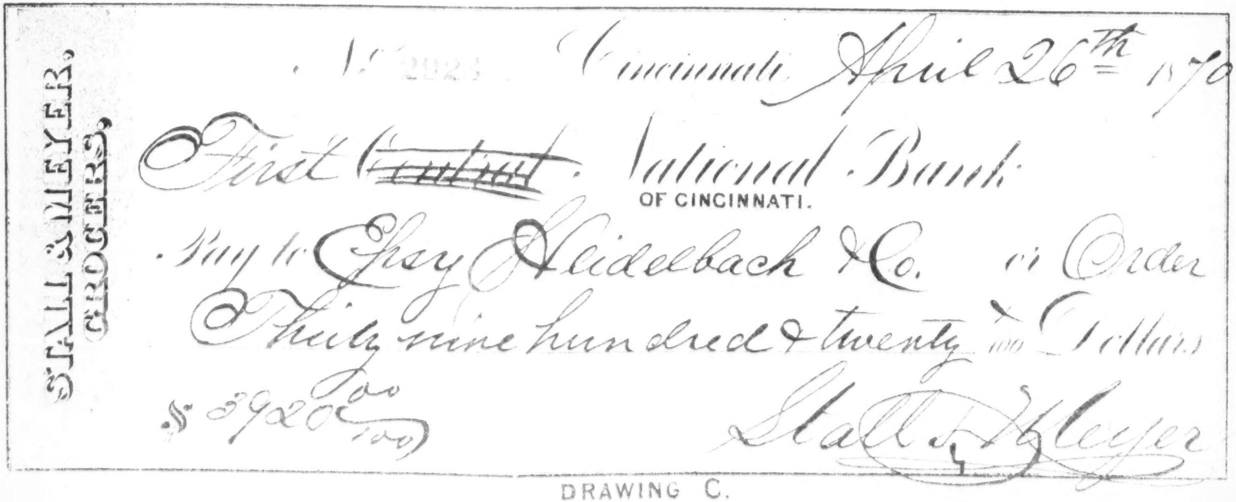
Stall & Meyer

DRAWING B.



STALL & MEYER,
GROCERS,

No. 2923 Cincinnati April 26th 1870

First ~~Central~~ National Bank
OF CINCINNATI.

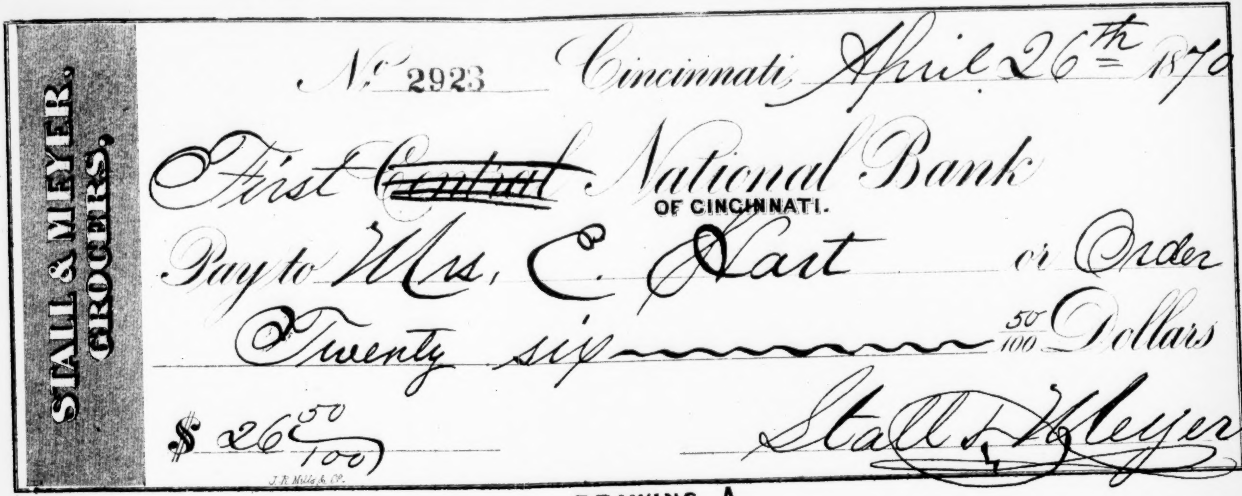
Pay to Espy Heidelbach & Co. or Order

Thirty nine hundred & twenty 100 Dollars

$ 3920 00/100

Stall & Meyer

DRAWING C.



STALL & MEYER,
GROCERS,

No. 2923 Cincinnati, April 26th 1870

First ~~Central~~ National Bank
OF CINCINNATI.

Pay to Mrs. E. Hart or Order

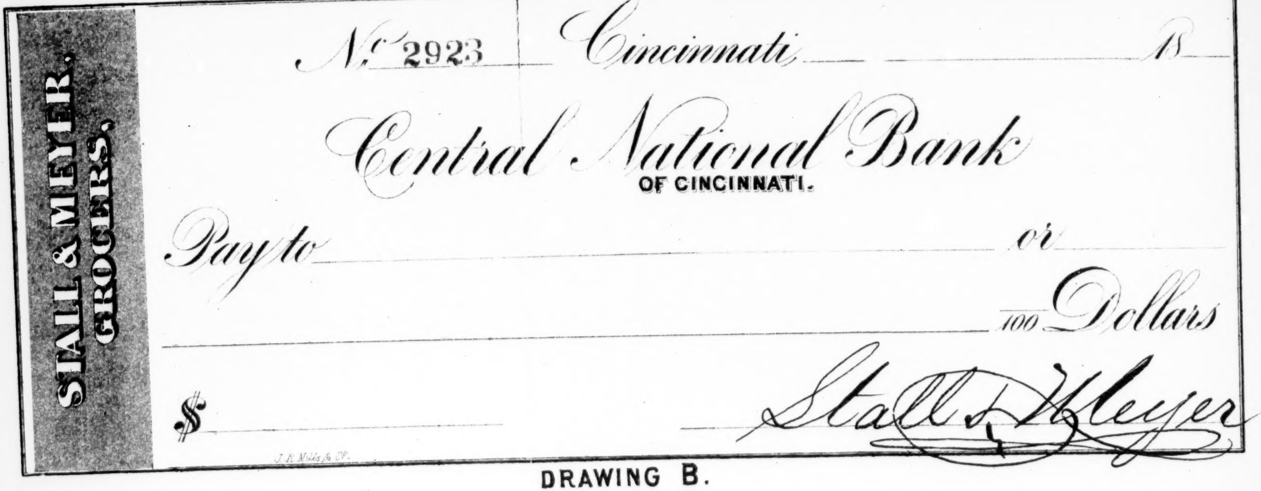
Twenty six $\frac{50}{100}$ Dollars

$ 26$\frac{50}{100}$

Stall & Meyer

J. R. Mills & Co.

DRAWING A.



STALL & MEYER,
GROCERS,

No. 2923 Cincinnati ______ 18__

Central National Bank
OF CINCINNATI.

Pay to ______ or ______

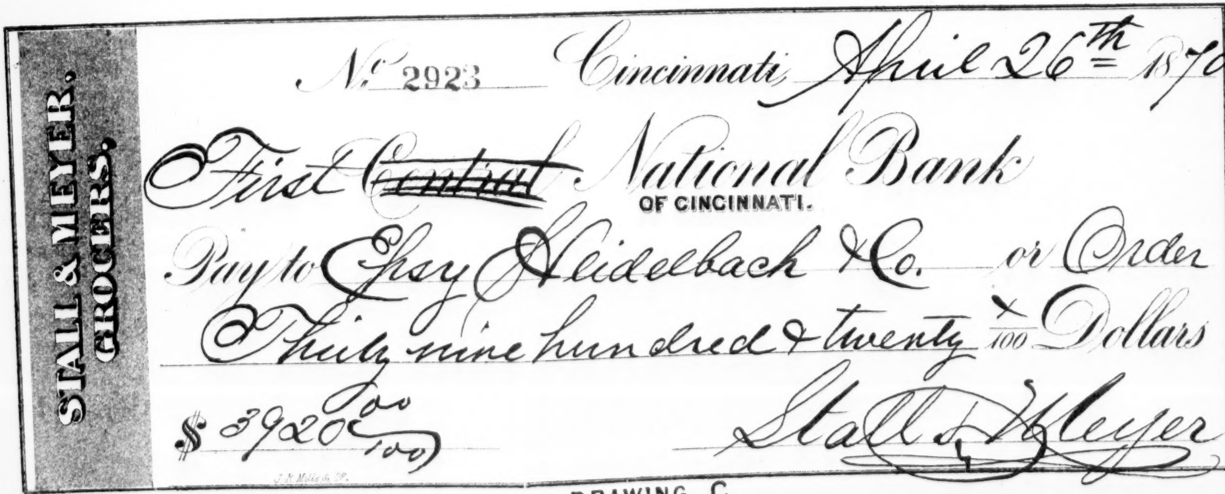
______ $\frac{}{100}$ Dollars

$ ______

Stall & Meyer

J. R. Mills & Co.

DRAWING B.



STALL & MEYER,
GROCERS,

No. 2923 Cincinnati April 26th 1870

First ~~Central~~ National Bank
OF CINCINNATI.

Pay to Espy Heidelbach & Co. or Order

Thirty nine hundred & twenty $\frac{x}{100}$ Dollars

$ 3920 $\frac{00}{100}$

Stall & Meyer

J. R. Mills & Co.

DRAWING C.

Robert Clarke & Co., Prs., 65 West Fourth St., Cin., O. [*Jan.* 1874.

Supreme Court of the United States.

First National Bank of Cincinnati

195.] ads.

Espy, Heidlebach & Co.

Error to the Circuit Court of the United States for the Southern District of Ohio.

STATEMENT OF FACTS.

This suit was brought by the First National Bank of Cincinnati, to recover thirty-nine hundred and twenty dollars, by them paid the defendants upon a raised check. The check purported to be the check of Stall & Meyer, for that sum, and was payable to the order of the defendants, and was indorsed by them as a check for that sum, to the plaintiffs below.

There are twenty-four assignments of error found in the commencement of the brief of the plaintiff in error. These errors depend upon two or three legal questions which were in dispute between the parties, and the errors assigned generally depend upon the determination of these questions.

That the Court may comprehend these questions, and the case as it stands between the parties, a short history of the case as it occurred is necessary. I quote from the bill of exceptions:

> "On the 26th of April, 1870, a stranger, representing himself to be acting for Mrs. E. Hart, of Hamilton, Ohio, purchased a bill of sugars, amounting to $23.50, in her name, of Stall & Meyer, grocers, of Cincinnati, Ohio, and paid for the same in a fifty-dollar bank-bill; that he requested the said firm to pay him the change or difference between the $23.50 in a check on their banker, as he would rather have such check, so as to show his principal that he was making no commission; and that thereupon the said Stall & Meyer gave him a check on the First National Bank of Cincinnati" . . . "for the sum of twenty-six dollars and fifty cents, payable to the order of Mrs. E. Hart." *Record*, p. 6, near the top.

Here it appears that this stranger has got the real check of Stall & Meyer upon the First National Bank of Cincinnati.

That he represented to *Stall & Meyer* that he was acting for Mrs. Hart is shown, but the Court will find it important to bear in mind that this representation of facts was not known to the First National Bank, nor so far as the record shows, to Espy, Heidlebach & Co.

The following is a copy of the check, as it was given by Stall & Meyer. (See drawing "A.")

The Court will observe that the printed form of this check was one for the CENTRAL NATIONAL BANK OF CINCINNATI, and that the printed word CENTRAL is erased in ink, and the word FIRST written before it.

The explanation of this fact is not wholly unimportant. The Central National Bank of Cincinnati had been in existence till about two weeks prior to the time of this transaction, when it closed its business and transferred its books, accounts, and customers, so far as it could, to the plaintiffs, the FIRST NATIONAL BANK OF CINCINNATI. Stall & Meyers, having been depositors of the CENTRAL NATIONAL BANK, had a check-book with blank checks for that bank, and they continued their business with the First National Bank, and had continued to use their old check-book, erasing the printed word "Central" and writing "First" in ink, and continuing the serial numbers of their checks on from the last number used in the Central Bank, and the check in question was the number reached by them on that day. This fact was known to Sandford, the teller of the First National Bank, and probably to Mr. Espy, for the firm of Stall & Meyers was a well-known firm, and the fact that the customers of the Central had gone to the First National, was notorious among bankers. It could not have been otherwise.

The Court will observe, then, that this check was written upon the real blank or form, used by Stall & Meyer in drawing their checks upon the First National, with the correct number, and with the real signature of Stall & Meyer, whose account was then good for the amount, *and was payable to the order of* ESPY, HEIDLEBACH & Co., who must indorse and give credit to it, and *who surely ought to know the party with whom they dealt.*

Bearing these facts in view, for they are the undisputed facts of this case, we proceed with a further statement. The records show—

"That the parties receiving the check from Stall & Meyer altered it by what is called "raising," so as to take out all the written portion thereof except the signature, and to make the amount payable THIRTY-NINE HUNDRED AND TWENTY DOLLARS, and the name of the payee, ESPY, HEIDLEBACH & CO., by writing the same therein with the date and the word "FIRST" in place of "CENTRAL" in the name of the bank, and the same sold and delivered to the defendants, who were their private bankers in Cincinnati, who indorsed and collected the same, viz., the sum of *three thousand nine hundred and twenty dollars* thereon, from the plaintiffs, through the agency of the clearing-house at Cincinnati, whereof both the plaintiffs and defendants were members, on the same day, April 26, 1870; and that the said alteration was not detected by the plaintiffs until late in the afternoon of the next day, April 27, 1870, when it came to light by reason of an apparent overdraft, then discovered in the said account, which overdraft was caused by the check in controversy, and other checks afterward drawn,"

—when notice was at once given, etc. *Record*, p. 6, second paragraph.

The record further shows there was evidence tending to show—

"That the name of Espy in the defendants' firm name is, and then was, very frequently misspelled Epsy, and that such transposition of letters was not calculated to attract, and did not attract attention; that there was nothing suspicious in the check, nor was its value suspected or doubted—*the said alteration or 'raising,' having been so skillfully done as to be impossible of detection by inspection of the check;* that said check was made by filling up one of the regular blank checks of Stall & Meyer on the Central National Bank, the printed word 'Central' being erased by drawing ink lines through it, and writing the word 'First' over it, and the number being in the regular series of the printed number at the point reached in their business, and of the date of the check, which printed blank Stall & Meyer were then using, said Central National Bank having then recently ceased to do business, and its customers and accounts transferred to the plaintiff." *Record*, p. 7, middle thereof.

The whole written part of the check was taken out, except the signature of Stall & Meyer, and the check then appears thus. (See drawing "B.")

This taking out is done by chemicals, in such a way as not to affect the face of the paper, or so as to be in any way detected by the writing over it. The check is then filled up and appears thus. (See drawing "C.")

It is in this form when taken by Espy, Heidlebach & Co., and when first seen by the plaintiff's teller, and when paid through the clearing-house. The defendants offered evidence tending to show—

"That the banking-house of the First National Bank was then situated one square distant from the banking office of the defendants, and the store of Stall & Meyer was then situated three squares from said last-named banking-house, and two squares from the plaintiff's bank; that it was then the custom of banks and bankers of Cincinnati, including the plaintiffs and the defendants, when a check is presented by a stranger, if made payable to the order of the bank to whom it is presented, to *send it for advice of its value, not to the drawer of the check*, but to the bank on which it is drawn; that the defendants informed said stranger that as he was a stranger to them, they could not take said check and part with their said bonds and gold until they had sent to the plaintiff *and ascertained its value.* That thereupon the defendant's teller, Ansel G. Jenny, took the check from the said stranger and handed it to George Schwarzenberger, one of the messengers of said bank, and told him to take it to said First National Bank, and show it to Wm. H. Sandford, paying-teller thereof, and ask him to examine it particularly, because it was presented to him by a party he, said Jenny, knew nothing about; that thereupon said Schwarzenberger took said check to the First National Bank, and handed it to said Sandford, the paying-teller thereof, and asked him to examine it very particularly, because it was presented to said Jenny, teller of the defendants, by a stranger; that Sandford is the proper officer of the plaintiff, duly authorized to certify or pay checks, or to furnish verbal or other information of their value; that *Sandford, said teller, then examined said check very particularly, comparing it with other checks of Stall & Meyer; said he was not very familiar with Stall & Meyer's checks, as the account had been transferred from the Central Bank but a short time;* and he then continued such examination, at the end of which he returned it to said Schwarzenberger with the reply, 'It is all right; send it through the clearing-house;' which reply said Schwarzenberger, at once returning to the defendants' bank, communicated, at the same time handing back the check to their teller, said Jenny, as follows: 'It is all right; send it through the clearing-house,' or, 'It is all right; put it through the clearing-house;' and said Jenny immediately accepted the check from the said stranger in exchange for said gold and bonds, and delivered said gold and bonds to said stranger, who, without delay, departed with them to parts unknown, and has never since been seen or heard of by any party or witness in the case; and said check was thereupon, on the same day, collected by the defendants from the plaintiffs, through the clearing-house." *Record*, pp. 7, 8.

This is the account that the defendants presented as their side of the case. A square, in Cincinnati, is 400 feet, and it thus appears that though the store of Stall & Meyer is but 1,200 feet from the banking-house of Espy, Heidlebach & Co., the plaintiffs receive this large check from a stranger without making any inquiry of him as to who he was, or requiring him to identify himself, as was usual at that time in such cases; and that *their messenger was told by Mr. Sandford that he was not very familiar with Stall & Meyer's checks.* It also appears that there was no request whatever made of Mr. Sandford *that he should certify said check, or anything more than ask for his advice or his opinion as to the signature and the state of the account;* and it further appears that his *attention was not called to the filling up, nor was he asked for any opinion as to that,* and that he gave no such opinion, but carefully compared the check with others, and with the signatures, and examined the account, but *did not certify or understand that he was certifying it or asked to certify it, nor did the other party so undestand it.*

The records upon this point further show that—

> "The plaintiff offered evidence tending to show that when the plaintiff's teller, Sandford, was addressed by the defendant's messenger, nothing was said by said messenger with reference to the check having been presented to said Jenny by a stranger, and that the reply of said Sandford to said messenger was, 'The check is good, or all right; send it through the clearing-house.' And further, that said Sandford, by way of caution, told said messenger at the same time that if said check was offered by a stranger, he would advise them to have nothing to do with him; that he would be careful and not pay so large a check to a stranger, no matter how good-looking he was; that he said *Sandford examine the check very carefully; saw nothing about it to lead him to doubt that it was Stall & Meyer's genuine check for that amount—examining not only their signature in the signature back, but all the signatures on checks presented before that time drawn by them.*
>
> "And the witness, Sandford, further testified that when checks *had been presented by a stranger, he had more than one hundred times sent them to the drawer for advice of value.*" *Record*, p. 8.

Upon this point there were examined four experienced bankers, who were the cashiers of the principal banks of the city, and the record shows—

> "And the said Goodman, Bissell, Griffith, and Stanwood, all experienced bankers, testified that when checks of this kind, of large amount, were presented by strangers to their banks, they did not take them without learning who he was." *Record, p.* 10, *middle of the page.*

The mode of certifying checks at the banks was also shown to be, for the teller to write across the face of the check "good," and sign his name or initials thereunder, and at once charge the amount to the drawer, and enter the check in a book kept for that purpose, which is crossed off on payment. The language of the record is—

> "Can not certify any other way than in writing, done by the paying-teller writing across the face of the check "good" for the amount, stating it when properly indorsed, and signing his initials. He then charges the check to the drawer, and makes a memorandum of the details of the check in a book kept for that purpose, which is crossed off on payment." *Record*, pp. 6, 7.

And that the First National Bank of Cincinnati never certified in any other way.

There was no evidence whatsoever to contradict the testimony of Sandford, Goodman, Bissell, Griffith, and Stanwood, all bankers of long experience, as to the inquiries made in reference to the party presenting such a check to a bank for payment or sale.

And though no such inquiries were made by Espy, Heidlebach & Co., Sandford swears:

> "That he supposed Espy was sharp enough to know with whom he was dealing, and that he supposed he was dealing directly with Stall & Meyer." *Record*, p. 9.

The Court will observe that though the plaintiffs claim to have given evidence tending to show that Sandford was told that the party presenting the check was a stranger, it does not appear that he was told in what character he presented it—whether as agent for Stall & Meyer, or otherwise.

It appears in the record that after the party had learned the price of the bonds and gold of Espy, Heidlebach & Co., and the exact amount to which they came, he said to them:

> "He was doing business through Stall & Meyer, and would go to their store for a check, *and would be absent one or two hours; that in about* TWO HOURS *he returned and produced the check in question in the form in which it now appears.*" *Record*, p. 7.

It does not appear that anything of this kind was reported to Sandford, and he was in fact ignorant of it, and of anything going to show that the stranger did not in fact act for Stall & Meyer. So far as he knew, he might have been acting for Stall & Meyer, though a stranger to Espy, Heidlebach & Co.

There was also evidence in the record going to show that the terms "good," "all right," stated by a banker upon whom a check is drawn to a banker to whom it is offered, under the circumstances, had acquired a limited meaning among Cincinnati bankers at the time, and was understood to relate only to the signature and the state of the account, and that Sandford so understood it, and did not intend to give any other opinion about the check. *Record*, pp. 8, 9, and 10.

There was also evidence tending to show that—

> "Although there was a usage for one bank to which a check was offered, to send it to another bank, in which it was drawn, to know as to the genuineness of the signature and the state of the account, there was no usage of their sending to inquire, or of a banker's passing on the filling up, *or whether the check had been raised or not, and that it was impossible to detect a raised* check, or to tell whether it was raised or not; that when the messenger, Scharzenberger,

presented the said check, *their attention was not called to the filling up, nor was any question asked in reference to that, nor was any statement made by the messenger that they would in fact take the check, or were going to take the check; nor did the plaintiff know what the transaction between the defendants and said stranger was, nor that it would be consummated, nor anything that was communicated by said messenger, as hereinbefore specified;* nor did the plaintiff know that the defendants had in fact taken the check until it came to it, in the regular process of collection, as aforesaid, through the clearing-house." *Record,* p. 10.

This statement of the case is taken from the record, hereby quoted as above. It shows the following state of facts:

1. That the check was made payable to Espy, Heidlebach & Co., and indicated on its face that the defendant was having some dealing with Stall & Meyer; and, though there was evidence tending to show that Sandford was told that the check was brought to the defendants by a stranger, yet that there was no evidence tending to show that the plaintiffs knew that the transaction was not directly with Stall & Meyer. Indeed, the record expressly shows that Sandford understood it to be with them. *Record,* p. 9.

2. That Stall & Meyer's store was within twelve hundred feet of Espy, Heidlebach & Co.'s bank, and that it was quite usual for bankers, when a check of the kind was presented to a banker by a stranger, for the bank to whom it was presented to send to the drawer for information, and usual not to take it without knowing whom the stranger was (*Record,* pp. 6, 7, 10), and that nothing of the kind was done by the defendants.

3. That though it was usual for bankers upon whom a check of the kind was drawn to give information to a banker to whom it was presented, as to the state of the ac-

count and *as to the genuineness of the signature*, that it is not usual for them to pass upon *the filling up, or whether the check is raised or not, and that it is impossible for such bank to tell whether a check is raised or not.* And it also appears that the alteration in this case "*was so skillfully done as to be impossible of detection by inspection of the check.*" *Record*, pp. 7, 10.

4. It also appears that the plaintiff knew nothing of the suspicious circumstances connected with the check, or that the party having dealing with Stall & Meyer and being entitled to their check, should not have got it payable to his own order, as is usual, and identified himself by Stall & Meyer, nor that he would be gone, and was gone, *two hours to get the check* from Stall & Meyer, to whose store he could have walked in five minutes. *Record*, p. 7.

5. That the plaintiffs used all possible care in examining the check, and gave an honest opinion after a most careful examination, at the same time telling the messenger *that he was not very well acquainted with the signature;* that they had no knowledge of the transaction, or whether it would be consummated, and had a right to suppose *that all due care and caution would be exercised by Espy, Heidlebach & Co. before they gave value for such a check, and indorsed the same.*

6. That as to all the facts as to which Sandford could have superior knowledge to Espy, to wit, the state of the account and the signature of Stall & Meyer, they were in fact all right, as appeared upon the check, and there was no mistake therein, and that the mistake was only in that part of it *directly connected with the defendants' name, and which required them to indorse it and to give currency to it as a check really for* $3,920, and properly payable to them.

Bearing these admitted facts in mind, we are in a position to examine the questions made in the record.

These questions range themselves under four heads:

First. Was there error at the trial prejudicial to the plaintiffs in error, the defendants below, in relation to the admission of evidence?

Second. Was the check in fact a certified check when taken by the plaintiffs in error?

Third. Were the plaintiffs below, the defendants in error, estopped from showing that the check was a raised check?

Fourth. Were the plaintiffs below entitled to recover as for money paid under a mistake of fact?

I.

There was no error to the prejudice of the plaintiffs in error in the reception of evidence objected to.

FIRST. The first error assigned relates to this question put Sandford, objected to:

> "What effect, if any, did the filling up of the check in the name of Espy, Heidlebach & Co. have upon the examination of the check? If it led in your mind to any conclusion as to the parties with whom the transaction was made, state what it was."

Exception was taken to permitting this question.

And the SECOND assignment of error is to the refusal to rule out the answer, which was in these words:

> "That he supposed Espy was sharp enough to know with whom he was dealing, and that he supposed he was dealing directly with Stall & Meyer."

Now, there was no error in this, nor was it prejudicial to the plaintiffs in error.

The record shows the raising of the check was so skillfully done as not to be detected. The plaintiffs in error show this. *Record*, p. 7, *the middle of the page*. The record also shows that bankers are not in the habit of passing upon the genuineness of the filling up, and

> "that it was impossible to detect a raised check, or to tell whether it was raised or not."

All this Espy knew.

It also shows that Sandford used every possible care in examining the check, and pronounced an honest opinion, and one which, so far as he intended to give an opinion, or could have been supposed to give one, his opinion was accurate and could not have misled. There being a usage to pass upon the signature and the state of the account by the banker upon whom the check is drawn, he having a better opportunity to know these facts than a strange banker; and there being a usage for the first-named banker to pass upon the above facts, and no usage for them to pass upon the filling up, or upon the question whether it be a raised one or not, and it being impossible for a banker to tell these things, the security of a banker in taking such check and the security of commercial transactions must rest upon the care and caution of the party taking such check, and of his knowledge of the person with whom he deals. He, and he only, saw him or knew that he was going to take the check. He only had any right or opportunity to require him to identify himself or give an account of himself; and he only had any right to send to Stall & Meyer, the drawer (who alone could tell these facts), as to the check. He alone had the profit of the transaction and was called upon to use diligence in these particulars, for the record shows that in such diligence alone can there be any security whatsoever.

It was claimed by the plaintiffs in error, as they claim here, that what Sandford said to the messenger amounted to an estoppel *in pais*.

This question and answer relates to that point and was competent upon that. It also relates to the care and skill of Sandford in relation to the check. The check itself indicates that Espy, Heidlebach & Co. were dealing with Stall & Meyer, a well-known and responsible house; and as it was payable to Espy, Heidlebach & Co., and as Sandford's attention was not called to the filling up or he asked any question about it, it would be natural for him to think *that this part of the check directly connected with their name was accurate.*

Surely this was competent, inasmuch as it had a tendency to show due care on his part and good faith in the reply he made to Schwarzenberger, and it therefore affected the question of estoppel *in pais*. This will more fully appear further on.

SECOND. The third assignment of errors is to the permitting Sandford to answer this question:

> "When a check of this character is presented by one bank to another with request to know whether it is good or not, has this term any special or limited meaning among bankers? If so, to what is it limited or confined?"

Now, it does not appear what Sandford's answer was, and therefore this question can not be considered. *Record*, p. 9. The record shows that the plaintiffs below gave testimony, to show that the terms "good," "all right," under circumstances aforesaid among bankers, meant to refer, and by usage among Cincinnati bankers at and about April 26, 1870, would be understood to refer, to the genuineness of the signature and the state of the drawer's account only. *Record*, p. 9. It does not appear that this particular evidence came from Sandford, or that it was objected to.

But as that was Sandford's answer, and as these parties were bankers, this proof was competent. I shall hereafter show that none of this evidence could have prejudiced the plaintiffs in error.

THIRD. The fourth assignment of errors relates to a similar question put to GOODMAN, thus:

> "When a check is sent by a bank to which it is offered, to the bank upon which it is drawn, to know whether it is good or not, and the answer is, 'that it is good,' or, 'all right,' if that answer has acquired any peculiar or limited meaning among bankers, state what that meaning is, and to what it is limited?"

This witness answered that it—

> "Had acquired a peculiar meaning, and was understood to refer to the genuineness of the signature, and whether the money was in bank to meet the check."
>
> "On cross-examination, he said that he had never heard the subject of the meaning of said terms discussed, or any question made as to the same, or known of any transaction requiring the decision as to their meaning, before April 26, 1870, and having further testified that the terms, 'it is good,' or 'all right," 'send it through the

clearing-house,' had not acquired any peculiar or limited meaning, the defendant moved to exclude the answer as incompetent."

And the overruling this motion to exclude is the *fifth* error assigned:

1. As to excluding the testimony because the witness had not heard the question discussed or known of any case which required its determination, that may greatly affect its value, but does not make it incompetent. He, being an experienced banker, may nevertheless know the limited meaning of the term—at least may give evidence tending to show its limited meaning. He might know the meaning put upon it by their daily practice, by numerous instances falling under his notice, though he had not known of it being discussed or of any controversy like this, requiring a determination of it, before this case arose.

A matter which arises from the practice of bankers, an experienced banker may speak of it. Suppose, the day this matter was discovered, all the bankers at once discussed the matter as to the meaning of this term in reference to their long practice, could not an experienced banker speak of it, though no controversy had before arisen in reference to it, or without any such discussion, from his own knowledge and experience?

2. Now, as to the objection arising from the fact that there were other words used at the same time, to wit, the words "send it through the clearing-house," and the whole as one sentence, "Good," "All right," "Send it through the clearing-house," had not, prior to this time, received any peculiar or limited meaning. Why would it not be competent to show the meaning of the words "good," "all

right?" It is evident that these are the only effective words, if any there be, to create an estoppel. The words "send it through the clearing-house," were evidently an incidental remark, which did not qualify or change the meaning of the words "good," "all right." They did not change the meaning of those words, nor in any way affect the course to be taken.

These two bankers belonged to the clearing-house, and the check would have taken the same course precisely if this expression had not been used.

The record shows, what is known to the Court, that—

> "The clearing-house is, and was then, an incorporated association of the banks and bankers in Cincinnati for the easy mutual daily settlement of balances and *exchange of checks between them*, into which each bank brings, and then brought, daily, after 2¼ o'clock P. M., *all the checks received and held by it*, *drawn upon the other banks*, members of the clearing-house, and receives, and then received, in exchange of the checks drawn upon it, held by the other banks and bankers, members of the clearing-house, balances being settled in cash." *Record*, p. 8.

Sandford's remark, "Send it through the clearing-house," was evidently but a casual remark, expressive of the course which the thing must take if the defendants in error took the check, and therefore this remark did not in any way affect the meaning of these words—were, indeed, no part of them, and can cut no figure in the case. It was surely not incompetent to show the limited meaning of the words "good," "all right."

FOURTH. The *sixth* error assigned in the brief relates to this question put to the witness Bissell:

"What, if any, custom or usage exists among banks and bankers in Cincinnati as to sending checks to the drawer, or to the bank on which the check is drawn, for advice as to its value?—after the witness had testified that he could only answer from his own practice."

1. Now, Bissell being an experienced banker could tell his own practice, as it *tended*, to some extent, to prove the usage of bankers. It is quite common for men of long experience in trade to answer such a question in that way.

Suppose all the bankers in the city had answered this question in this precise way, would not that have shown the usage? That being so, this question was proper, though Mr. Bissell said he could only speak from his own practice. A usage is made up by the uniform practice of those interested for years. The practice of one of these men *tends* to prove it.

2. But there is another answer to this assignment. It is this: What the witness answered is not found in the record, and the Court can not therefore say that there was error to the prejudice of the plaintiff in error in permitting this question to be answered.

This answers all the errors assigned as to the reception of evidence. But I think there is a general legal question governing this controversy that must necessarily dispose of this whole matter, irrespective of these questions. This question will be presented further on.

II.

There was no certification of the check in question.

It was next claimed that the check was certified by the defendants in error before the plaintiffs in error took it, and that he took it relying upon the faith of such certification. This certification, it is said, was made by SANDFORD, when Schnarrenberger presented him the check, and is found in his statement, "good," "all right," etc.

This can not be regarded as a certification, for several reasons.

FIRST. *Neither party understood the check to be certified. Sandford was not asked to certify it, and it is clear that he did not intend to certify it, or understand that he was certifying it.*

If the certification of a check be a contract between the parties, they must understand that they are, in fact, making the contract of certification.

The certifying a check is done in a well-known way in England and in this country, and it has existed so long and so uniformly that bankers understand how it is done and when it is done. It is by writing "good," or equivalent words, across the face of it, and by signing the name or initials of the certifying officer under these words, and I shall endeavor to show that there is no other safe, secure, or commercial way of certifying a check. And Sandford had no right to certify in any other way. It was against the usage of the bank and the powers given him, which it will not be presumed that he intended. It was against the general and well-known mercantile usage throughout this country and in England, for many years—a usage which Espy knew as well as Sandford.

Mr. STANWOOD, the cashier, says that the teller

> "Can not certify in any other way than in writing, done by the paying-teller writing across the face of the check, 'good' for the amount (stating it), when properly indorsed, and signing his initials. He then charges the check to the drawer, and makes a memorandum of the details in a book kept for that purpose, which is crossed off on payment." *Record*, pp. 6, 7.

The course allowed in this bank is an accurate mode, as practiced in the whole country and in England.

Nothing of this kind was done. Sandford was simply asked for an opinion as to the check; really a statement as to the signature, and whether there was money to pay it.

No other question occurred to Espy or Sandford, and it is not claimed that he was asked to certify it or that he supposed he had certified it.

Schnarrenberger did not ask Sandford to certify or accept it, but "*to examine it very particularly*, because it was presented by a stranger," etc. He did not ask him anything in reference to the filling up, and he knew that Sandford's attention was directed to the signature and the state of the account only. What Sandford did, and what passed at the time, shows that a certification was not asked, and that neither party supposed they had received it. *Record*, p. 8.

Jenny, the cashier of the plaintiffs in error, when he gave the check to Schnarrenberger, did not request him to go and have it certified, as he would, if any such idea had been in his mind, but to

> " *Show* it to Wm. H. Sandford, and ask him to *examine* it very particularly, because it was presented to him by a party he knew nothing about." *Record*, p. 7.

This was all Schnarrenberger was requested to do, and all he pretends to have done, and Sandford did all he was requested to do, and had no intention of doing more, or of certifying the check, and did not do so. And Mr. Jenny, who took the check, had no right to suppose he had certified it, and did not so understand. *The record does not show an agreement of certification*, but is inconsistent with the idea of a certification.

The case of *Powell* v. *Jones*, 1 Esp. 18, is to the same effect, and has a very direct bearing upon that now before the Court. It was a decision before LORD KENYON.

It was an action as upon an accepted bill of exchange. The bill was left with the defendant for acceptance by the plaintiff's clerk. The next day he called for it, when defendant returned it, saying, "there is your bill; it is all right."

It was contended that this was a verbal acceptance. LORD KENYON ruled, that these

> "Words could by no implication amount to an acceptance; that they conveyed no evidence of the defendant's intention to bind himself to the payment of the bill at all events, which was necessary for the purpose of charging him as acceptor."

Here are the very words said to have been used by Sandford, the words which Judge Hoadly seems to think so important in his brief. See that brief, p. 30. This was also a draft left with the defendant for acceptance, and notwithstanding what he said when he returned the draft, the fact that he did not accept, on its face, was sufficient to show that there was no acceptance. If this was not a verbal acceptance, how can what Sandford said to Schnarrenberger under the circumstances be so held?

SECOND. *The check was not certified, for the reason that defendants in error were in no condition to obtain a certification, and did not therefore ask it.*

A certification of a check is a new contract directly between the bank certifying and the holder.

Morse on Banking, 83, 84.
Girard Bank v. *Bank Penn Town.*, 39 Penn. St. 99.
Meads v. *Merch. Bank of Albany*, 25 N. Y. 147.
Banres v. *Ontario Bank*, 19 N. Y. 159.
Farm. and Merch. Bank v. *B. and D. Bank*, 4 Duer.

It is equivalent to a deposit made by the payee or holder, and the money is from that time transferred by the certification from the drawer to the holder or payee.

Girard Bank v. *Bank of Penn Town.*, 39 Penn. St. 99.
Mer. Bank v. *State Bank*, 10 Wal. 648.
Willetts v. *Phœnix Bank*, 2 Duer, 132.

This doctrine is clearly expressed by Mr. Justice STRONG, in giving the opinion of the Court in the case of the *Girard Bank* v. *Bank of Penn Town.*, thus:

"When a check payable to bearer or order is presented with a view to its being marked "good," and is so certified, the sum mentioned in it must necessarily cease to stand to the credit of the depositor. It thenceforth passes to the credit of the holder of the check, and is specially appropriated to pay it when presented, and as the purpose of having it so certified is not to obtain payment, but to continue with the bank the custody of the money, the holder can have no greater rights than those of any other depositor." 39 Penn. St. 99.

This is substantially what is stated by this Court in the case of *The Merchants' Bank* v. *State Bank*, 10 Wal. 648.

A party, then, to get a check certified, must be the owner of it at the time; for no one else has any right to authorize the money to be permanently taken out of the drawer's account and placed to the account of any other person.

Now, the claim of the plaintiffs in error is that *Espy, Heidlebach & Co.* did not own the check at the time they sent it to the bank and made the inquiries of Mr. Sandford.

They say that they might have refused to take it when the messenger, Schnarrenberger, returned to their banking-house.

The First National Bank did not know what the transaction was, or whether it would be consummated or not. All they knew was that here was a check for $3,920, from Stall & Meyer, payable to the order of Espy, Heidlebach & Co., which was presented to them by a man they did not know, and Espy, Heidlebach & Co. wanted to know if the signature was genuine and the account good, as they would have done, perhaps, if Stall & Meyer had presented it by an unknown clerk or agent of theirs. Nothing else occurred to them, and the usage and circumstances under which it was presented, shows that nothing more was intended or understood by either party.

Again: If it be said that the check was that of the forger when presented, then Espy, Heidlebach & Co. were his agents and bound by his knowledge, and can not claim anything by what was said by Sandford.

He was in no position to authorize $3,920 of cash to be taken from Stall & Meyer's account and appropriated to his or to Espy, Heidlebach & Co.'s. See *Hall* v. *Fuller*, 5 B. & C. 757.

Whatever the statements of Sandford may amount to by way of an estoppel, they can not amount to a certification of the check.

THIRD. *A check is certified by writing upon it, and should not be certified in any other way.*

I have stated, on page 19 of this brief, the usual mode of writing a check, and referred to sundry authorities in reference thereto. The following cases also show the same:

Morse on Banking, 190, 284.
Merchants' Bank v. *The State Bank*, 10 Wal. 648.
Claflin v. *Farm. and Cit. Bank*, 25 N. Y. 296.
Willitt v. *Phœnix Bank*, 2 Duer, 122, 130, 131.
Clarke N. Bank v. *Bank of Albion*, 52 Barb. 594.
Bickford v. *First Nat. Bank of Chicago*, 42 Ill. 241.
Rounds v. *Smith*, 42 Ill. 246.
Brown v. *Decker*, 43 Ill. 499.
Farm. and Mech. Bank v. *Butch. Bank*, 16 N. Y. 36.
Barnes v. *Ontario Bank*, 19 N. Y. 159.
Robeson v. *Bennett*, 2 Taunt., 396.
Bellamy v. *Majoribanks*, 7 Exch. 404.
Carlton v. *Ireland*, 5 El. & Bl. 769.
Girard Bank v. *Bank Penn Town.*, 39 Penn. 99.

These authorities show that the mode permitted by this bank was the usual mode throughout this country and in England; and that this mode has existed for more than sixty years.

I have very carefully examined, and can find no case of a certification of a check by parol, and the learned counsel has cited but one case—that of *Barnet* v. *Smith*, 10 Foster, 256. That case did not present the fact of a certification, for the check was presented to the cashier of the bank and he said he would pay it, and he did then and there pay it while it was on the counter before him, where it was first presented. The suit was not upon the check. The Court cites sundry cases, and then use the words quoted by the learned counsel, to wit:

> "Upon the doctrine of these authorities, it would seem that the presentment of this check to the cashier of the bank, and his statement that it was 'good,' would amount in law to an acceptance."

The authorities referred to, I have carefully examined, every one of them, and find that they all relate to formal bills of exchange and not to checks. And it is in reference to bills of exchange that the Court refers when they say:

> "In general, as no formal act is required to constitute a simple contract, and any mode which demonstrates an intention to become bound by it, will have an obligatory force upon the contracting parties, so any act of a drawer or an acceptor, which evinces a consent to comply with the request of the drawer, will constitute an acceptance."

The Court in this case, without being called upon to decide any such question, for the fact did not call for it, seem to regard a check as a bill of exchange, and branches off in the learning relating to verbal acceptances of such instruments, and in terms apply it to the check which was paid at the time it was pronounced good, and where no facts called for any such discussion.

Now, although a check in form resembles a bill of exchange, it is not a bill of exchange and differs from it in several particulars.

1. It is drawn on a banker and is not intended to perform the office of a bill of exchange, and circulate from hand to hand with indorsers. Its chief office is to make cash payments.

Story on Promissory Notes, sec. 494.
Mer. Bank v. *State Bank*, 10 Wal. 647.

2. It is not entitled to grace.

Mer. Bank v. *State Bank*, 10 Wal. 647.
Morse on Banking, 242.
West. Bank v. *Wheaton*, 4 R. I. 37.
Champion v. *Gordon*, 70 Penn. St. 475.
Andrew v. *Blackley*, 11 Ohio St. 94.

3. Though payable on sight and at once, the holder need not present it on time, and if he present it at any time within the statutory bar, and give notice of its non-payment, the drawer is liable, unless he has lost something by the delay.

Mer. Bank v. *State Bank*, 10 Wal. 647.
Land v. *Rand*, 3 Com. Bench. (N. S.) 448.
Bell v. *Alexander*, 21 Grat. 6.
Little v. *Phœnix Bank*, 2 Hill, 429.
F. & M. Bank v. *B. & D. Bank*, 4 Duer, 219.

Whereas, in relation to a bill of exchange, it must be presented on the day it falls due, and irrespective of any loss to the drawer, or he will not be bound.

Lester v. *Given*, 8 Bush, 360.
Roschild v. *Corny*, 9 B. & C. 391.

4. If a check is presented and payment is refused, notice need not be given the next day, in order to bind the drawer, unless he thereby be injured.

Lester v. *Given*, 8 Bush, 360.
Story on Promissory Notes, secs. 391, 392.

Whereas, in reference to a bill of exchange, the notice must be the next day, whether there be loss or not, to bind the drawer.

5. It is always drawn upon a fund, when a bill is not. *Mer. Bank* v. *State Bank*, 10 Wal. 647.

6. A banker is under no legal obligation to the holder of a check to accept or pay it. He violates no obligation to him by not accepting or by refusing to pay.

Bank of Republic v. *Millard*, 10 Wal. 155.
Carr v. *Nat. S. Bank*, 107 Mass. 49.
Chapman v. *White*, 2 Seld. 417.
Bullard v. *Randall*, 1 Gray, 606.
Moses v. *F. Bank Balt.*, 34 Md. 580.
Loyd v. *McCaffrey*, 46 Penn. 414.
Bellamy v. *Majoribanks*, 7 Exch. 404.
Case v. *Henderson*, 23 La. An. 49.

The check is not an assignment of the fund. See cases above.

This rule is not universally acknowledged, but is the law of this Court, and generally in this country.

Andrew v. *Blackley*, 11 Ohio St. 93.
Lester v. *Given*, 8 Bush, 360.
Stewart v. *Smith*, 17 Ohio St. 85, 86.
Roberts v. *Corbin*, 26 Iowa, 315.

If the check be accepted or certified, then it is a payment to the holder, and he becomes a depositor from that time, and the drawer is no longer interested in it.

Girard Bank v. *Bank Penn Town.*, 39 Penn. 99.
Merchants' Bank v. *State Bank*, 10 Wal. 347.
See also cases above.

A certified check is supposed to represent so much money in the bank; whereas, an accepted draft by a bank does not represent any such thing, and is simply the engagement of the bank to pay it, and does not necessarily or naturally represent money actually in bank, or create the relation of a depositor with the holder, as an accepted or certified check does. So that the authorities in reference to the verbal acceptance of bills does not hold as to verbal certification of checks.

Most of these distinctions are clearly and succinctly stated in the opinion of this Court in the case of *The Merchants' Bank* v. *The State Bank*, 10 Wal. 647, delivered by Mr. Justice SWAYNE, thus:

> "Bank-checks are not inland bills of exchange, but have many of the properties of such commercial paper; and many of the rules of the law merchant are alike applicable to both. Each is for a specific sum payable in money. In both cases there is a drawer, a drawee, and a payee. Without acceptance, no action can be maintained by the holder upon either against the drawer. The chief points of difference are that a check is always drawn upon a bank or banker; no days of grace are allowed. The drawer is not discharged by the laches of the holder in presentment for payment, unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, and the statute of limitation runs only from that time. It is by its face the appropriation of so much money of the drawer in the hands of the drawee to

the payment of an admitted liability of the drawer. It is not necessary that the drawer of a bill should have funds in the hands of the drawee. A check in such case would be a fraud." 10 Wal. 647.

As has been before stated, when a party presents a check for certification, he should have the right to authorize the amount of money to be taken from the drawer's account and charged to him, and placed to the credit of the holder, *for such is the office of a certification of a check.*

"It implies that the check is drawn upon sufficient funds in the hands of the drawee; *that they have been* set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment." 10 Wal. 647, 648.

"In well-regulated banks, the practice is *at once* to charge the check to the account of the drawer, and credit it to a certified check-account, and when the check is paid, to debit that account with the amount." 10 Wal. 648.

The party presenting a check for certification must have the right to authorize the above, and the bank should do it, or confusion in the accounts, and difficulty and loss, will follow. If he is asked to certify, he knows what he is doing; he has a right to, and should know that he is authorized to do what is set out in the above quotation, and he is put on his guard. See quotation on p. 32 of this brief, from 2 Vroom. 566. The very fact that he is asked to certify the check, instead of being asked to examine it and give an opinion in reference to it, involves all this.

When it was presented to Sandford for his opinion, it is said to have been the property of the men of whom they received it, and therefore they could not authorize this course to be taken with it, which a certification involves. If they did not own it, and were not, in law, bound to take it, and were acting for themselves, they were in a position to inquire about it, get an opinion of Sandford about it, and then take it or not as they pleased; but they could not authorize those things necessary for a proper certification, and they did not therefore ask it, and Sandford did not undertake to certify it. These considerations also show that there was no certification of this check.

FOURTH. *A verbal certification would lead to confusion and be of dangerous tendency, and should not be allowed.*

It would lead to disputes, and enable parties to show an acceptance where none was asked or intended, as in this case.

It would lead to fraud upon the bank, for when such a check was afterward presented for payment, how could the bank know that it was the same check? Another for the same amount might be substituted and get first paid, and then the first one be presented.

The danger in relation to the verbal acceptance of bills has been so great, that statutes in England and elsewhere have made provisions against it. Stat. 1 and 2 Geo. 4, ch. 78, sec. 2. This is true of New York, Missouri, Alabama, California, Wisconsin, and perhaps other states. See *note u*, 1 Parsons on Notes, 285, 286.

It has been often regretted by distinguished judges that any verbal acceptance of a bill of exchange ever had been permitted.

LORD KENYON, Ch. J., said:

"It is much to be lamented that anything has been deemed to be an acceptance of a bill of exchange besides an express acceptance in writing." *Johnson* v. *Collins*, 1 East, 103.

And in that case it was held that a separate promise in writing to accept a future bill was not an acceptance.

A similar decision was made in this Court in *Boyce* v. *Edwards*, 4 Pet. 122, in which the Court held that a promise in advance to accept, to be available, must point distinctly to the very bill offered for acceptance, and regret is expressed that a verbal acceptance of a bill of exchange was ever permitted. The Court say:

> "Courts have latterly leaned very much against extending the doctrine of implied acceptance, so as to sustain an action on the bill. For all practical purposes, in commercial transactions on bills of exchange, such collateral acceptances *are extremely inconvenient, and injurious to the credit of bills*; and this has led judges frequently to express their dissatisfaction, that the rule had been carried as far as it has; and they regret that any other act than a written acceptance on the bill had ever been deemed an acceptance." 4 Pet. 122, 123.

In that case this Court reversed the Circuit Court for ruling that a letter promising to accept was an acceptance, though taken by the holder on the faith of the letter.

In the case of *Overman* v. *Hoboken City Bank*, 2 Vroom, 566, it was contended that the defendant having retained a check twenty-four hours before it was returned "not good," was an acceptance under the usage of the New York banks, the check having been sent from the Bank of Commerce of New York to the Ocean Bank of that city, and by the latter bank sent to the Hoboken Bank for payment.

It was held that peculiar usage of the kind should be strictly construed, and that the Hoboken Bank was not within the usage, and was not liable.

The Court say, speaking of bills, etc.:

> "Constructive acceptances ought to be watched with the utmost care, *for when a party puts his name on a bill, he knows what he does, and that he thereby enters into a contract;* but it is laying down a very loose and dangerous rule when any degree of latitude is given to these constructive acceptances. The cases which have been determined in favor of these constructive acceptances have all been decided upon very special circumstances." 2 Vroom, 566.

The Court, in last cited case, refers to Chitty on Bills, and quotes the above therefrom, and also the opinion of BAILEY and ABBOTT, JJ., in the case of *Jeune* v. *Ward*, 1 B. & A. 162, where the majority of judges express opinions against any extension of verbal acceptances of bills of exchange. Among them, ABBOTT, J., says:

> "I look with the greatest anxiety at these constructive acceptances; *for every decision of that kind introduces uncertainty upon a subject where the greatest certainty should prevail.* If, indeed, it were *res integra*, it would be most desirable that the liability of the acceptor should be confined to the case of an actual acceptance on the face of the bill. I own that I wish the rule had been so laid down originally." 1 B. & Ald. 662.

It is evident that an agreement to accept a bill might be a contract, but not by law assignable, and therefore is inconsistent with the peculiar idea of a bill of exchange.

It may have been made with reference to promises to put the party in funds; or the promise of means out of which to provide funds, as goods to be shipped for sale, or promises which had not been fulfilled; and therefore to permit a letter to be taken as an acceptance, because shown to the party taking the bill, would be making a use of it not contemplated, and leading to great injustice.

It is, in fact, as is said by ABBOTT, J., greatly injurious to bills, as introducing uncertainty where the greatest certainty should prevail, and is inconsistent with the distinguishing feature of a bill of exchange.

There have been cases, as where parties solicited consignments and in consideration thereof have promised to accept bills, and where to obtain and forward the shipments, bills have been drawn and negotiated with express reference to such purpose, where it was but just to require an acceptance. Such was somewhat the character of the case of *Schummelfinch* v. *Bayard*, 1 Pet. 284, 285, and yet the plaintiffs there failed; or where there has been a distinct promise that if the plaintiff would buy a given bill, the defendant would accept it, and where the suit was between the parties, as in the case of *Townley* v. *Sumrell*, 2 Pet. 181.

In this case the Court say:

> "The question whether a parol promise to accept a non-existing bill, amounts to an acceptance of the bill when drawn, is quite a different question, and does not arise in this case. If the promise to accept were binding, the plaintiff would be entitled to recover, although it should not be a virtual acceptance; and the point, whether it were an acceptance or not, does not appear to have been made in the Court below." 2 Pet. 182, 183.

These are the three cases cited by the learned counsel on page 20 of their brief. They give very little comfort to any general rule as to verbal acceptances of bills, much less that of checks. They tend to restrict the doctrine of *Coolidge* v. *Payson*, 2 Wheat. 66; to say the least of it, regret that it was ever recognized, and throw a doubt over that case. It related simply to a letter written, promising to accept a bill, describing it in terms not to be mistaken. That was an early case, decided with reference to the early cases in England, so much since regretted, and in which the justice of the case and the hardship of the refusal to accept and pay had much to do with its final determination.

The case of *Howland* v. *Carson*, 15 Penn. St. 453, goes still further to throw doubt over the doctrine of verbal acceptance, for the holder of the bill would be entitled to proceed against the acceptor of it, if it were in fact accepted, and yet the Court hold, in that case, that he can not. The fact is, that the great danger to the usefulness of bills of exchange, in the commerce of the world, by permitting verbal constructive or collateral acceptances, has been so great that it has not only been gradually forbidden in England, and in many of the states of this country, but regret has been thus expressed that it had ever been permitted, though the practice had not become general, and it only prevailed in a few exceptional cases. 2 Vroom, 566.

As checks are not inland bills, the authorities establishing verbal acceptance of such bills do not authorize or require verbal certification of checks. No doubt a verbal contract may exist to accept a check, and that the party will be liable upon it, but it is not a check or any part of it.

The reason for permitting verbal acceptance of a bill does not hold for a check, and the unbroken usage is against it. See the cases cited on p. 25 of this brief.

Checks are drawn on banks or bankers, and are for immediate payment. They do not originate in circumstances such as has attended the bills of exchange where verbal acceptances have been permitted. And if a certification is agreed upon, it is quite easy to write on the bill "good." It brings the minds of the parties directly to the matter that they are making a contract and changing the relations between them, and places the matter on the check to go with it *as a part of it* (a check or bill of exchange can not rest in parol, and pass from hand to hand), and prevents all uncertainty, and dispute, and fraud.

The law merchant arose from the custom of merchants. That was its controlling element. It is that that originally made bills of exchange assignable, and broke in upon the principle that a chose in action could not be assigned.

It is that which gives grace to bills of exchange, and varies the days of grace according to the custom of the place.

Indeed, usage in commercial and practical affairs is a very broad and controlling principle of the law.

Now, whatever may have been the exceptions permitted in relation to bills of exchange, in reference to verbal acceptances, *it has not prevailed in reference to checks. The usage is directly the other way.* No case of a verbal certification can, I think, be found; none has been cited.

And, as checks are not bills of exchange, it does not follow that verbal acceptances or certifications are a part of the law of checks, even if it be a part of the law of bills.

The principle of the law merchant that bases it on usage, is therefore opposed to the idea of a verbal certification of checks.

Such a certification would lead to very dangerous consequences.

It would create confusion in commercial dealings, as that it was ever recognized, and throw a doubt over that case. It related simply to a letter written, promising to accept a bill, describing it in terms not to be mistaken. That was an early case, decided with reference to the early cases in England, so much since regretted, and in which the justice of the case and the hardship of the refusal to accept and pay had much to do with its final determination.

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Such a certification would lead to very dangerous consequences.

It would create confusion in commercial dealings, as was said by Abbott, J., in the case of *Jeune* v. *Ward*, and lead to fraud and imposition upon banks and bankers, and enable the officers of the bank to make way with funds of the bank.

The fact is now apparent that the written certification, though valuable at times and for some purposes, has led to much fraud, as the reported cases show. See

Merchants' Bank v. *State Bank*, 10 Wal. 64.
Meads v. *The Merchants' Bank of Albany*, 25 N. Y. 145.
Farmers & Mech. Bank v. *B. & D. Bank*, 16 N. Y. 127.
Barnes v. *Ontario Bank*, 19 N. Y. 153.
Clarke National Bank v. *Bank of Albion*, 52 Barb. 597.
Pope v. *Bank of Albion*, 59 Barb. 227.

And it was at one time decided by high authority that no officer of any bank could make a written certification. *Mussey* v. *Eagle Bank*, 9 Met. 314.

Some of the dangers of permitting even a written certification are thus set out by the Supreme Court of Massachusetts, in that case of *Mussey* v. *Eagle Bank*, 9 Met. 314:

> "But if a usage had been proved, of the certifying, by the teller, that the check is good, to enable a holder to use it afterward, at his pleasure, we are clearly of opinion that such a usage would be bad, and could not be upheld. It would give to bank checks, which are intended for immediate use, and are the substitutes for specie in the ordinary transactions of business, the character of bills of exchange payable to the bearer, the bank being acceptor, and payable at an indefinite time. It would lead to loans to favored individuals, without the usual security; it would substitute checks for cash, in the hands of tellers who receive them; and would confer the power upon a single officer to pledge the credit of the bank, by the mere writing of his name—a power never contemplated by the legislature, nor intended to be conferred by the stockholders. It would ex-

pose the teller to the frauds of a book-keeper, and both of them to the temptations of unprincipled and greedy men, who might, under various pretenses, procure their checks to be thus certified, in the first instance, when their deposits were good, and afterward, when there was no balance to their credit—allowing interest as a bonus for the certificate to the certifying officer, who would afterward receive such checks as cash."

The practice of certifying checks has, however, notwithstanding the view of the Supreme Court of Massachusetts, been settled otherwise, and there is no doubt that the practice of certifying checks, if confined within proper limits, may be a useful one.

But, in order that it be so, the practice should not be carried beyond the usage, which requires a written certification upon the face of the check, and should not be extended to the verbal certification so much deprecated by many learned judges in this country and in England, as to bills of exchange.

Now, there is no inconvenience in requiring a written certification on the check. There is no necessity for a verbal certification. It is contrary to established usage, and inconsistent with our idea of a check, that it shall rest, part in writing and part verbal. It is given for immediate presentation, and as an easy mode of making cash payments. This is its purpose.

It would inevitably lead to dispute, imposition upon the bank, and confusion in the accounts of the bank; often create acceptances where none were in fact intended. Look at the consequences that would follow from verbal certifications during the late panic, when the banks were compelled to use this means as never before, or rather resorted to it!

As there is no law now in force for verbal certifications, no usage for it, and as such acceptances of bills has been so often regretted by the courts in this country and in England, why resort to it now in reference to checks? Why extend a dangerous practice to certification checks when the usage controlling them has not permitted it?

FIFTH. *There is another consideration which shows that there should be no verbal certification of a check allowed.* It is this. Though the principal office of a check is to make immediate cash payments, yet, by law, checks need not be presented at once, and are never considered as overdue. They require a demand before the statute of limitations begins to run against them. *Girard Bank* v. *Bank of Penn T.*, 39 Penn. 99. See cases cited on p. 26 of this brief.

This law is peculiar to checks, and does not apply to a bill of exchange, or note payable on demand even, for that becomes dishonored or past due unless demanded within a reasonable time.

Now, to permit the vicious practices of verbal acceptances, so much deprecated in reference to bills, and let checks remain part in writing and part in parol, and the parol part to float in the air an invisible attendant on and necessary part of the check, and negotiable with it, and to be subject to all the imposition and fraud which falsehood and the death of witness might cause—surely, no such thing can be permitted in reference to such an instrument!

The usage out of which a certification has been permitted, and the rule of law requiring a demand before it becomes due, would seem to forbid such a thing.

SIXTH. *It is taken for granted in many of the cases that an actual certification of a check binds the payee absolutely to pay in all events.*

This is the general drift of most of the authorities. But it is not a uniform rule. A case has lately been decided by the Supreme Court of New York, which establishes an opposite doctrine. I refer to the case of the *Irving Bank of New York* v. *Mutual Bank*, 36 N. Y. 335.

In that case, it was held that though a note made payable at a bank is marked good, and is stamped paid, yet that the bank discovering that there were no funds at the time to pay it, might return the note and give notice to all the parties, and that they were not bound by their certification.

It was held in that case that the making the note payable at a bank was authority to that bank to pay, and that when presented at the bank by another bank holding it and it is marked good, stamped, and the sum charged to the maker, who was one of its depositors, yet that the note could be returned, if in time to notify all the parties, and the certificate withdrawn, if the bank discovered that the depositor had no money in bank to meet it.

I take this from the opinion of the Court, given by HUNT, J.:

> "Such a certificate possesses no extraordinary or hidden power. It should impose no greater liability than its terms fairly require. Divested of all technical terms, the transaction in question was simply this: The Seventh Ward Bank present for payment at the Irving Bank, where it is made payable, the note of Morris Wilson. The making the note payable there was a warrant from the maker to the latter bank to pay it from his funds and charge it to him. When the note is presented, the teller of the paying

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The usage out of which a certification has been permitted, and the rule of law requiring a demand before it becomes due, would seem to forbid such a thing.

SIXTH. *It is taken for granted in many of the cases that an actual certification of a check binds the payee absolutely to pay in all events.*

This is the general drift of most of the authorities. But it is not a uniform rule. A case has lately been decided by the Supreme Court of New York, which establishes an opposite doctrine. I refer to the case of the *Irving Bank of New York* v. *Mutual Bank*, 36 N. Y. 335.

In that case, it was held that though a note made payable at a bank is marked good, and is stamped paid, yet that the bank discovering that there were no funds at the time to pay it, might return the note and give notice to all the parties, and that they were not bound by their certification.

It was held in that case that the making the note payable at a bank was authority to that bank to pay, and that when presented at the bank by another bank holding it, and it is marked good, stamped, and the sum charged to the maker, who was one of its depositors, yet that the note could be returned, if in time to notify all the parties, and the certificate withdrawn, if the bank discovered that the depositor had no money in bank to meet it.

I take this from the opinion of the Court, given by HUNT, J.:

> "Such a certificate possesses no extraordinary or hidden power. It should impose no greater liability than its terms fairly require. Divested of all technical terms, the transaction in question was simply this: The Seventh Ward Bank present for payment at the Irving Bank, where it is made payable, the note of Morris Wilson. The making the note payable there was a warrant from the maker to the latter bank to pay it from his funds and charge it to him. When the note is presented, the teller of the paying

bank informs the presenter that the note is good; in other words, that the maker has the funds in the bank to meet it. This information may be communicated verbally, by letter, or by a memorandum on the note, ordinarily called a certificate. If the note were presented by an individual, the money would ordinarily be paid to him in satisfaction, and the note left with the paying bank. In the case of a bank, the note is taken back by the party owning it, to be returned the next day in the settlement of exchanges, as an item of credit in its favor, and against the certifying bank. This is the usual course of business in the city of New York. The correctness of this certificate is a matter which the certifying bank has the means of knowing, and is bound to state correctly. If the presenting bank relies upon its accuracy, and fails to charge the indorsers, as upon non-payment, on presentation, the certifying bank is estopped from denying the truth of its statement. Having asserted, of its own knowledge, that the maker had funds in its bank to meet the note, and the presenting bank, having omitted to charge its indorsers, in reliance upon such statement, the certifying bank will not be permitted to go behind its own statements. The teller of the bank is the proper officer to make this statement, and his statement binds the bank, whether accurate or erroneous.

"In the present case, the Irving Bank discovered its error in stating that it had funds for the payment of Wilson's note, in sufficient time to prevent any loss in consequence of the error. It immediately notified the Seventh Ward Bank of the error, and in time to enable it to make a re-presentment, if necessary, and to charge the indorsers. No damage, therefore, could accrue to the latter bank from the erroneous information. They were bound to accept, and to act upon the corrected information, if there were time and opportunity so to do."

See opinions in the case of Nat. Bk. Commerce v The Nat. Bk. Ass. decided in the Supreme Court of N. York. Affirmed by the Court of Appeals

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It is a fact that in the cases in reference to the written certification of checks, there is great division of opinion, nearly all the cases being decided by a divided Court.

Merchants' Bank v. *State Bank*, 10 Wal. 652.
Farm. and Mech. Bank v. *B. & D. Bank*, 16 N. Y. 143.

Barnes v. *Ontario Bank*, 19 N. Y. 169.
Meads v. *Mer. Bank of Albany*, 25 N. Y. 145.
Peterson v. *Union National Bank*, 52 Penn. 209.

The case, however, of *Mussey* v. *Eagle Bank*, 9 Met. 314, is a unanimous opinion of the Supreme Court of Massachusetts against the whole matter of certification of checks, as being unauthorized and of dangerous tendency.

III.

THE QUESTION OF ESTOPPEL.

The check being payable to Espy, Heidlebach & Co., and indorsed by them, they can not set up this defense.

The check being thus payable, must necessarily be indorsed by Espy, Heidlebach & Co.

The indorsement was a request that the bank pay the sum of $3,920 to any party to whom it was passed.

The indorsement of a bill of exchange or check is equivalent to a new bill for the sum named, upon the payee, and in favor of the party to whom they passed it; and where the indorsement is in blank, as it was in this case, in favor of the legal holders. *Odgen* v. *Sanders*, 12 Wheat. 341.

The filling up, out of which all the trouble in this case has come, was, "Pay to the order of Espy, Heidlebach & Co. THIRTY-NINE HUNDRED and TWENTY DOLLARS," and when they indorsed it, as they did, and must have done, in this case, they assert it to be a check for *thirty-nine* and *twenty* *dollars*—that is the legal effect of the check being payable to their order, and of their indorsement of it.

Still more, the indorsement was a statement that they had title to the check, as payees—in other words, title to a check—for $3,920.

When this check then was presented by the messenger of Espy, Heidlebach & Co. to Sandford, the paying-teller of the First National Bank of Cincinnati, without any allusion to the filling up, it was equivalent to an assertion upon their part *that it was a check for that sum;* and when taken, in connection with the facts shown in the record, to wit, that there was no usage for banks to pass upon the genuineness of the filling it, and that it is impossible for them to tell anything about it, they having no better means than others of ascertaining this fact; and that there was a usage of passing upon the genuineness of the signature and of the state of the account—all these things, when taken in connection with the fact that the check was payable to the order of Espy, Heidlebach & Co., and must be indorsed by them, show that, unless it were a check for that amount, they imposed upon Sanford when he was requested to examine the check; and, instead of estopping the bank, they are themselves estopped from setting up this defense.

"Another engagement, implied in every indorsement, on the part of the indorser, is that all the antecedent parties upon the bill, whether drawers or indorsers, are persons having competent authority to draw the same; *that the indorser has, in virtue thereof, a good title to the bill;* and that he has a right to convey the same by his indorsement, *and according to the tenor thereof.*" Story on Bills, sec. 110.

"There is yet another engagement, which is implied in every indorsement on the part of the indorser. It is that the instrument which he indorses *is a genuine instrument,* *and not forged;* that the signature of the drawer and all the antecedent indorsers are genuine; and that he, the indorser, has a good right to transfer the same to the immediate indorsee." Story on Bills, sec. 111.

It is doubtful, to say the least, whether, as between these parties, this law is modified in any respect.

As between the First National Bank and a *bona fide* indorsee from Espy, Heidlebach & Co., for value, it would be modified to this extent, and to this extent only: that the bank is bound, at its peril, when it pays such check, to know the signature of its customer, or of the drawer. For satisfactory reasons the drawee takes this responsibility.

In relation to a check or bill payable directly to the party, as to Espy, Heidlebach & Co., it is exceedingly doubtful whether there is any modification of the above rules. It can not be too much to require the *payee* that he know that he has, in fact, the real check of the party promising to pay *him* the sum named.

This case shows—the whole matter of raised checks and bills, shows that there can be no security, except in requiring the *payee* to know that he has got the check of the party who promises to pay *him, and for the sum* therein named.

But the rule, as between the payee and a *bona fide* indorser, goes no further than to the genuineness of the signature of the drawer. It does not touch the filling up, the amount of the check or draft, the genuineness of any other signature, as, for instance, that of the payee or any indorser, *nor the title to the bill.*

Swan v. *N. B. Ins. Co.*, 7 Hurl. & Nor. 657.
Beeman v. *Duck*, 11 M. & W. 254.

Robinson v. *Yarrow*, 7 Taunt. 457.
Ellis v. *The O. L. Ins. and Tr. Co.*, 4 Ohio St. 657.

Now, what title had Espy, Heidlebach & Co. to a check of Stall & Meyers for *thirty-nine hundred and twenty dollars?* None at all.

What was, therefore, in law, implied by their indorsement—what was, in good faith, implied in their presenting such a check to Sandford, *as a* check for $3,920, for an opinion under the usage set up in this record, *was not true; and if they succeed in this defense, would be an imposition upon the bank—and that brought about by an application of the doctrine of equitable estoppel!*

Instead of estopping the First National Bank from a recovery, as has been stated, they are themselves estopped from setting up this defense, by the essential elements of the doctrine of estoppel *in pais.*

SECOND. *There was negligence on the part of the plaintiff in error, which prevents their setting up this defense.*

This is an important point in the case, as it is, to a greater or less extent, in all of this class of cases.

As the defendants in error did not see the check when it was paid, the same having been paid through the clearing-house, *which was the agent of both these parties*, there was no negligence, and could have been none, in the plaintiff at the time of payment.

It is also shown in the record that there was none by Sandford when the check was presented to him for his opinion. The record shows not only that the forgery was of a character to defy detection, but that Sandford gave it the most careful examination.

There was positive neglect on the part of the plaintiffs in error in several particulars, which prevent their setting up an estoppel against the defendant in error, if it could ever exist as to such a matter.

First. It was a suspicious circumstance that when this stranger left Espy, H. & Co.'s, he said he "might be gone an hour or two hours," to get a check from Stall & Meyer, when in fifteen minutes the whole could have been done. This fact was known to Espy, Heidlebach & Co., and not to the First National Bank. This fact, with the fact that he *was gone two hours* (long enough for him to "raise" the check) before he returned, known only to Espy, Heidlebach & Co., was suspicious, and should have led to inquiry in reference to such large amount, when this kind of forgery is so common and impossible of detection by inspection.

Second. It was a still more suspicious circumstance that this stranger, having a dealing with Stall & Meyer which entitled him to a check for $3,920 cash, should not have the check payable to his order, whereby his indorsement would have been a receipt to Stall & Meyer. That it may perform this office, checks are now generally made payable to order. Espy, Heidlebach & Co. knew that they had no dealing with Stall & Meyer, and the fact that the check was made payable to the plaintiffs in error is a suspicious circumstance. It avoided the indorsement and identification of the stranger, and of course all clue to him. This fact was also known to Espy, Heidlebach & Co., and not to the First National Bank. Sandford has, in fact, sworn that he supposed the dealing was between Espy, Heidlebach & Co. and Stall & Meyer, as the check would indicate, though presented to Espy, Heidlebach & Co. by a stranger.

Third. It was a great want of care for a banker to take a check thus presented and thus payable, from a stranger with whom they were dealing, without sending to Stall & Meyer to inquire about it, or requiring him to identify himself. They had the profits of the dealing; they alone came in contact with the forger; they alone could inquire of Stall & Meyer or require of him an identification. And it was in proof from the bankers that it was customary to require of a stranger presenting a check for that amount, that he identify himself or show who he was, and Sandford testified that he had more than one hundred times, when strangers presented checks of that size, sent to the drawer of the check to inquire about it before taking it.

The decided cases show that it is at least twenty-five years since this process of raising checks and bills became public. 2 Comst. 230.

Espy, Heidlebach & Co., as bankers, knew of this matter of raising checks, and that it was impossible to tell from the check that it had been raised. They knew that they could get no knowledge *upon that point* from the First National Bank, and that there was but one place from which any knowledge could be got—that was from Stall & Meyer, or through an identification of the party; and they should not have taken the check without inquiry of Stall & Meyer, or without making the stranger identify himself.

No stranger can collect a check in any Cincinnati bank, for any considerable sum, though the same be payable to bearer, unless he identify himself or be indorsed by some one known to the bank. That is, and has been, the case since this "raising" process was begun by the rogues.

The idea that Espy, Heidlebach & Co. could throw the responsibility of such a matter upon the First National without giving them any notice that they suspected even such a matter, and they could thereby get rid of the responsibility of knowing with whom they dealt, and whether the check *payable to their order, and which they must give currency to by their indorsement, were for one sum or another*, by any such inquiry as they made of Sandford, without informing him that they desired from him more than the usage in such cases would indicate—such an idea could not be tolerated in business matters for one moment, and can receive still less countenance by the principles of law.

He who has the profit of a dealing must take its responsibility. The more this matter is examined in the light of this record, the more it is evident that there is now and can be no safety in taking such large checks but in knowing from whom you receive them, and whether they have in fact received such a check from the drawer.

As a banker has a better opportunity of judging of and ascertaining the signature of its customers than any one else, and of knowing the state of the account, as to these things they may properly be made responsible, and the law, for a uniform rule, has so made them.

It is a useful and convenient practice of one bank to whom a check, drawn upon another, is presented, to make inquiry as to the signature and the state of the account. As to these things the bank can speak, and ought to speak, with more or less accuracy. But if a bank was to be responsible for such a matter as that in controversy, the usage of inquiry, proved in the record, could not exist one day. No bank could give any information with safety in that event. And the record shows, that though there be a usage to inquire as to the value of the bill, referring thereby to the genuineness of the signature and the state of the account, there is no usage to pass upon the filling up, and that as to that no one can tell anything about it from the check.

Against this there is no other security, as this record shows, but an inquiry of the drawer of the check, and in making the party show who he is.

And such is the usage, and was at that time. *This usage Espy, Heidlebach & Co. did not follow*, and it was from a neglect to follow it that this loss has happened, and they must therefore bear the burden of it.

This is the common sense of the matter as well as the law relating to it.

Ellis v. *Ohio L. Ins. and T. Co.*, 4 Ohio St. 647.
Bank of Commerce v. *Union Bank*, 3 Comst. 235.
Park Nat. Bank v. *Fourth Nat. Bank*, 7 Abb. P. R. 138.

They have got the money of the First National Bank for nothing. No blame or want of due care is chargeable to that bank. The plaintiffs in error presented the check as one for $3,920, and had it in their power, by following this simple and effective usage, of discovering the fraud, and they only had such opportunity.

It was they that enabled the rogue to get this money and make away with it—and they only could have avoided it, as they ought, by the ordinary practice of their profession. The rule they cite bears directly upon this point, and is decisive against them.

Where one of two innocent parties must suffer from the fraud or wrong of another, he who enabled that other to commit such fraud or wrong must bear the loss. The First National Bank had nothing to do with the transaction or with the rogue—never saw him—could not require him to identify himself according to the usage in such cases, or inquire of Stall & Meyer as to the check.

They were simply asked an opinion by Espy, Heidlebach & Co., and they gave it honestly, after the most careful examination they could give. The record shows that they were exceedingly careful in examining the check, and that there was no mistake whatsoever in reference to the parts of it they were expected to pass upon; that it was impossible for them to have given any opinion upon the matter which caused the loss, had it been regarded, *and that Espy, Heidlebach & Co. had it in their power to discover the matter by following a usage among bankers applicable to such a case, and which they wholly neglected.* THESE FACTS ARE DECISIVE OF THE CASE AGAINST THEM.

The remarks of Mr. Chitty, in his work on bills of exchange, are in point. Speaking of forged bills, he says:

> "But, on the other hand, it may be observed that the holder who obtained payment, can not be considered as having altogether shown sufficient circumspection; he might, before he discounted or received the instrument in payment, have made more inquiries as to the signatures and genuineness of the instrument even of the drawer or indorsers themselves; and if he thought fit to rely on the bare representation of the party from whom he took it, there is no reason that he should profit by the accidental payment, when the loss had already attached upon himself, and why he should be allowed to retain the money, when by an *immediate* notice of the forgery, he is enabled to proceed against all other parties precisely the same as if the payment had not been made, and consequently the payment to him has not in the least altered his situation, or occasioned

any delay or prejudice." Chitty on Bills, 486. See also *Irving Bank v. Wetherald*, 36 N. Y. 336.

This matter has undergone a full and most able examination in the Supreme Court of Ohio in a case involving this very usage. It was in the case of *Ellis et al.* v. *Ohio Life Ins. and Trust Co.*, 4 Ohio St. 648–668, in which Judge RANNEY gave the opinion of the Court.

This case is directly applicable to that before the Court, and will repay a careful examination by each of the judges of this Court.

The opinion is exceedingly able, and goes to the very marrow of the whole matter.

That the Court may see the important and direct bearing which it has upon this case, I proceed, in brief, to state the facts and to quote somewhat largely from it.

In that case, during the pork-packing season, a stranger dressed in the garb of a Kentucky drover, appeared at the Ohio Life Insurance and Trust Company Bank with two checks, both of them checks of well-known houses engaged in the packing of pork, drawn upon Ellis & Morton, then private bankers of Cincinnati—one a check of Evans & Swift for $7,500, and one a check of S. Davis & Co. for $7,300. These two houses kept their bank accounts at Ellis & Morton's bank.

He expressed the desire to exchange the checks for Kentucky money (then in high credit at Cincinnati) or gold. The checks were taken and paid for in gold, at one-fourth premium for gold off. That same afternoon, these checks, with others upon Ellis & Morton, held by the Trust Company, were sent to Ellis & Morton in exchange and settlement, and that afternoon credited to the Trust Company and charged to the drawers. The forgeries were discovered ten days afterward, when one of the accounts was found overdrawn, notice of which was then given the Trust Company for the first time.

No inquiry was made of this person presenting the checks as to who he was, and no identity of course given, as the case shows it to have been usual with many of the bankers, under such circumstances, even at that time, December 14, 1852. 1 Handy, 99.

The season of the year; the appearance of the party, so entirely like many dealing largely with firms like Evans & Swift and Davis & Co., at that time of year (selling them hogs, which came largely from Kentucky, and were owned by just such men as this man appeared to be); the whole thing was so natural and life-like, that it did not occur to the cashier—an old cashier of many years' experience, Mr. Bishop, familiar with those whose checks were offered, and with the course of business at that season of the year—to inquire of the party who he was, or to give any identity, as was more or less usual at that time.

The paying-teller and the cashier of the Trust Company testified that the transaction was in the usual course of business, and that there was nothing about it to excite suspicion, as the parties whose checks were offered were large purchasers of produce at that season, and used large checks of the kind in so doing, and were large depositors at Ellis & Morton's.

At this time, December 14, 1852, the usage proved in this case, and as to which there was no contradictory evidence, was set up, and according to the case, as reported in Handy's Reports, was not proven as a general usage, but was testified to by many of the witnesses. 1 Handy, 99.

But this transaction having occurred in 1852, at Cincinnati, led to greater caution, and at the time the check in question was presented, was general. No evidence against it is found in this record.

The course taken at the trial of that case involved the effect of the conduct of the Trust Company, with reference to a usage of the kind, which the Court regarded as so reasonable as to the care they were bound to exercise.

JUDGE RANNEY says, in his opinion, in speaking of the facts:

> "The checks were before him some three or four minutes. He assisted in calculating the premiums. No question was asked as to who the presenter was, or as to his right to the checks. He was probably in the bank from two to fifteen minutes; should not have recognized him again. He carried off the gold in saddle-bags. Both the banks, upon which the checks were drawn, were within less than a square; there was nothing to create suspicion, and nothing unusual in the transaction." 4 Ohio St. 648.

Further on, he says:

> "For the purpose of showing what was claimed to be gross negligence on the part of the defendants, the plaintiffs introduced several witnesses engaged in the business of banking at Cincinnati, who expressed the opinion, that the defendants, in the exercise of proper diligence, *should have required the person presenting the check to have drawn the money himself, or should, by inquiry, have been satisfied of his right to it, and of his identity.* As expressed by one of them: It is the general custom in this city, when a check is presented for sale, that is, when it is presented by a stranger to a bank, not the one upon which it is drawn, to make inquiries in reference to his right to the check, and the identity of the person." 4 Ohio St. 649.

This last remark has a very decided bearing upon one feature of this case, to wit, that arising out of the fact that the check was payable to the order of Espy, Heidlebach & Co., giving Mr. Sandford the right to suppose that they knew it was in fact a check for $3,920. After recognizing the general rule, that would throw the loss upon Ellis & Morton, they having paid the checks so drawn on them, the Court say:

> "This is the general rule; but it has its exceptions, as well settled and resting upon reasons as solid and satisfactory as the rule itself. Wherever the mistake has arisen from the fault or negligence of the party paying the money, and can not be corrected without prejudice to the party who has received it, there can be no recovery, and simply because the plaintiff is alone in fault; the defendant is under no obligation to submit to loss, to extricate him from difficulty, and may therefore conscientiously retain the money. The question is, does this case fall within the general rule or the exception?" 4 Ohio St. 651.

Further on, the Court say:

> "We admit it to be equally well settled, that where the instrument is drawn upon, or purports to be signed by the party paying the money, to a holder without fault, and whose situation would be thereby changed to his prejudice if he was compelled to refund, the money can not be recovered back. The foundations of the rule are sufficiently obvious. The party is supposed to know his own handwriting in the one case, or that of his customer or correspondent in the other, much better than the holder can; and the law, therefore, allows the holder to cast upon him the entire responsibility of determining as to the genuineness of the instrument, and if he fails to discover the forgery, imputes to him *negligence*, and, as between him and the innocent holder, compels him to suffer the loss. For still stronger reasons, the drawer of a bill or check, who has accepted it, and again suffered it to go into circulation, is absolutely estopped to deny the genuineness of the drawer's handwriting. The

acceptance necessarily involves the most positive affirmation that the instrument is what it purports to be, and the acceptor is not permitted to withdraw the assertion, to the prejudice of those who have, in consequence of it, given credit to the paper.

"In all such cases, either of acceptance or payment, the foundation upon which the drawee is made to suffer the loss, is the imputed negligence in accepting or paying, until he has ascertained the bill to be genuine; and, in case of payment, notwithstanding he has done it in mistake, and parts with his money without receiving the supposed equivalent, and notwithstanding the holder has obtained the money without consideration, the former can not be relieved from the consequences of his negligence at the expense of the latter, and the latter may in equity and good conscience retain what he has got. *But this stern rule is only exerted in favor of a holder without fault, and for a valuable consideration; and we deem it equally clear that he may, by his own negligent conduct*, place himself in such an inequitable position in reference to the drawee, as to deprive himself of the benefit of this rule, and make it unjust and inequitable that he should keep what he has obtained by a mistake, and for which he has given no equivalent." 4 Ohio St. 652, 653.

After carefully examining many cases upon the subject, the Court proceeds:

"There can be no doubt of the correctness of these decisions. In neither case was the party receiving the money implicated in any fault; and while the decisions are based upon the analogy furnished by the rule, which fixes the right of a drawee or acceptor of a bill, it is very successfully shown that, in reason, the rule has a much stronger application to the redemption of bank notes, growing out of the fact that they purport to be the party's own paper, circulating as money, and therefore difficult to trace back, and from the greater facilities that a bank has to detect forgeries, by the use of registers and private marks. In the first of these cases, Ch. J. Parker commences his able opinion by laying down the general principle applicable to that and like cases. He says: 'In all such cases, the just and sound principle of decision has been, that if the loss can be traced to the *fault or negligence of either* party, it shall be fixed upon him. Generally, where no fault or negligence is imputable, the loss has been suffered to remain where the course of business has placed it.' And he very reasonably concludes, that it would seem to be a principle of natural justice, that where a loss has happened, he, through whose means it happened, should sustain it, although innocent, rather than he who is not only innocent, but wholly *without imputation of negligence.*" 4 Ohio St. 656.

Referring to the case of the *Canal Bank* v. *Bank of Albany*, 1 Hill, 287, the Court say:

> "We do not cite this case as bearing directly upon the point under discussion, . . . but the case is valuable for the general rule elicited by the Court upon a full view of all the cases we have cited, that 'money paid by one party to another through a mutual mistake of facts, *in respect to which both were equally bound to inquire*, may be recovered back; and that when money is thus paid upon a forgery, it is sufficient to give notice without unreasonable delay, after the forgery is discovered." 4 Ohio St. 657.

We claim that Espy, Heidlebach & Co. were bound to inquire, and were the only party who could do so. The case of *Ellis* v. *Ohio Life Ins. and Trust Co.* was one in which the signatures were forged, and in which it was admitted that the general rule bound Ellis & Morton in the cases, unless some want of care on the part of the Trust Company made it inequitable for them to hold the money.

It was not a case in relation to "raised" check, in which the rule is the other way, but a case where the payment by Ellis & Morton was in law a negligence affecting them, and the effect was to trace want of care to the Trust Company, and therefore the force of the quotation from the case in 1 Hill by Judge Ranney.

See Mellon v Johnston 3 B & B 466

Further on, and after examining other cases, and among them that of *Wilkinson* v. *Johnson*, 3 B. & C. 435, the Court say:

> "And while it is true, here as there, the plaintiffs ought to have satisfied themselves of the genuineness of the check before making payment, yet the fault 'was not wholly and entirely their own, but began at least' with the defendants; and the payment was made 'to a person not wholly free from blame, but to one previously in fault." 4 Ohio St. 661.

This is much in point to the question before the Court. The record shows that Sandford made every examination possible—was very careful. It is not pretended that he could have done more—is, in fact, stated in the record, as a part of the case of the plaintiffs in error, that the forgery was of a character not capable of discovery by an inspection of the check. *Record*, p. 7.

But the plaintiffs in error were brought into immediate connection with the rogue—had certain means of protecting themselves and the First National Bank of Cincinnati, by requiring an identification or sending to Stall & Meyer, as they well knew that "raised checks" and bills were a common mode of forgery, and that the drawee could not tell more about these than they could, and that, indeed, there was but one possible security in reference thereto—one commonly resorted to by bankers, as this record shows, to wit, to require the party presenting such a check to identify himself, or by making an inquiry of the drawers, Stall & Meyer. This usage, so easy, so simple, so common among bankers, so absolutely necessary for the protection against such forgeries, is sufficiently shown in this record, and if it were not shown as a usage, is so in accordance with our ideas of common security as to be adopted at once by the courts.

Judge Ranney further says:

> "In this case there is every reason to believe that if the defendants had required the person presenting the check to show who he was, he would have declined the ordeal, and it would not have been bought or paid. *The loss may, therefore, be traced directly to their negligence.* But whether this would have prevented the fraud or not, it is enough that both parties were bound to inquire, and, allowing both to be in fault, the result is precisely the same. The case of *Goddard* v. *The Merchants' National Bank* is full to the purpose; that, in order to bring the drawee within the exception to the rule, which allows money paid under a mistake of facts to be recovered back, the whole responsibility of investigating must be cast upon him by the holder, and, as between them, he must be left in possession of every effective means for prosecuting the inquiry." 4 Ohio St. 661.

Again, the Court say:

> "To entitle the holder to retain money obtained by mistake, upon a forged instrument, he must occupy the vantage ground, by putting the drawee alone in the wrong; and he must be able truthfully to assert that he put the whole responsibility upon the drawee, and relied upon him to decide, and that the mistake arising from his negligence can not now be corrected without placing the holder in a worse position than though payment had been refused. If the holder can not say this, and especially if the failure to detect the forgery, and consequent loss, can be traced to his own disregard of duty, in negligently omitting to exercise some precaution which he had undertaken to perform, he fails to establish a superior equity to the money, and can not with a good conscience retain it." 4 Ohio St. 662.

Still further, the Court, in speaking of such a usage as that claimed in this case, say:

See Wilkinson v Johnson 3 B&C. 428

"The custom which the plaintiff sought to establish, seems to have been one of the most reasonable character. It is a great error to suppose that the drawee of a bill or check is bound to rely upon his knowledge of the handwriting of his customer or correspondent. The testimony in the case, as well as every day's experience, shows this alone to be an insufficient security, when dealing with strangers and in large amounts, against the ingenuity with which forgeries are now committed. The next most effective precaution is that of requiring the holder to furnish some reliable information of himself, and of his right to the paper. But when another bank intervenes and takes the check, this can not be resorted to by the drawee. As between the banks, therefore, the observance of the custom becomes a matter of mutual protection, and saves to the drawee the benefit of this precaution. While the bank taking the check, by its exercise, is consulting its own security, as well as that of the bank upon which it purports to be drawn, it gets a full remuneration for its care, in the reciprocity afforded in relation to checks drawn upon itself, and taken in like manner." 4 Ohio St. 663.

Speaking of the English cases of *Gill* v. *Cubitt*, 3 B. & C. 466; *Crock* v. *Jardis*, 5 B. & Ad. 911; *Goodman* v. *Harvey*, 4 Ad. & El. 870, followed by this Court in *Goodman* v. *Simonds*, 20 How. 367, the Court say:

"They were all actions brought upon genuine bills, either stolen, lost, or fraudulently negotiated; and the rule which governed them all, has its foundation in that public policy which fosters the circulation of bills, as a medium of exchange, answering the purposes of currency. But the law has shown no such anxiety to facilitate the circulation of forgeries. On the contrary, however innocent and careful the holder may have been, if he is obliged to trace his title through a forgery, the instrument is a nullity in his hands. Before any encomiums can properly be passed upon the peculiar and happy adaptation of the bill of exchange for circulation, or any foundation can be laid for insisting that the title of the holder shall not be affected by anything that may have attended its private history before reaching his hands—a bill must exist, of which *title* may be predicated, and to which such considerations may be referred." 4 Ohio St. 665.

Again, I still quote from this opinion given by Judge Ranney:

> "The negligent omission of the plaintiffs to discharge this duty, resulting in injury to the defendants, lies at the very foundation of the rule, which subjects them to the loss and allows the defendants to retain the money. But it would indeed be singular, if the one party could be visited with consequences so severe, upon the mere legal imputation of negligence and injury, and the other stand wholly unaffected for their negligence, however gross and injurious it might have been. As was said in the *Bank of Commerce* v. *The Union Bank*, 'the plaintiff's right of recovery rests on equitable grounds;' and in our opinion they place themselves upon the highest equitable ground for a return of the money, when they show that it was theirs, that they parted with it by mistake, and without consideration, upon a forged instrument which the defendants, by their negligent disregard of duty, had contributed to induce them to act upon as genuine." 4 Ohio St. 666.

I quote further from the very able opinion :

> "The necessity for care and caution on the part of those who use bills and checks, to prevent injury to those upon whom they are drawn, is strikingly illustrated in another class of cases, which turned upon a principle very analogous to the one we have applied to this. As a general proposition, it is perfectly well settled, that payment upon a forged check or order can not be charged by the party paying, against the party purporting to have drawn the paper; but the latter will be entitled to recover the money intrusted to the former, however innocently or with whatever caution the payment may have been made." 4 Ohio St. 667.

I have quoted at length from this opinion of one of the ablest judges this country has produced, for the reason that the case arose between two bankers in Cincinnati, similarly situated to the parties in this case, and presented the same questions. It early gave notice of the necessity of bankers dealing with strangers upon large checks, that they could not fold their arms and throw the whole responsibility upon the bank upon which the check purported to be drawn; pointed out the only way that protection could be had in such cases, *and surely the only possible way in cases of this kind*, and required that he who took such check from a stranger should himself exercise all proper care and caution to protect himself and the bank upon which the check was drawn; and showing that he should do the identical thing here suggested or pay back the money which he had received under a mistake of fact, from the banker paying the check.

I commend this case to the careful examination of each member of the Court. It is full of sound legal discrimination, and puts the whole matter upon just grounds, upon which such commercial transactions alone can with safety rest, and relieves our law from one of its great perils—the danger of endeavoring to govern all cases by a few general rules, and applying those rules to cases where they can not apply.

That the Supreme Court of Ohio has placed this question upon the true grounds, I refer the Court to the following among other cases:

Bank of Commerce v. *Union Bank*, 3 Comst. 237.
Canal Bank v. *Bank of Albany*, 1 Hill, 287.
Goddard v. *Mer. Bank*, 4 Comst. 147.
Price v. *Neal*, 3 Burr, 1855.
Young v. *Adams*, 6 Mass. 187.
Wilkinson v. *Johnson*, 3 B. & C. 435.
Gloucester Bank v. *Salem Bank*, 17 Mass. 41.
Bernheimer v. *Marshall*, 2 Min. R. 84, 85.
Nat. Park Bank v. *Fourth Nat. Bank*, 7 Abb. Pr. R. N. S. 141, 144.
Bank of Albany v. *Bank St. Albans*, 10 Vt. 141, 144.

The basis or ground upon which the drawee banker is bound to lose the money thus paid upon a forged check is one of negligence, it having better means of judging; and though for uniformity a party could not set up as a defense that he had used due diligence in examining the signature of his customer before, in the absence of any neglect on the part of the party receiving the money, yet the rule has not gone so far as to relieve the prior party to the bill or check, and who was connected with its inception, from the exercise of all due and proper care in relation thereto, or gone further than to make the payee responsible for the genuineness of the signature of the drawer.

IT NEVER REACHED THE FILLING UP OR BODY OF THE BILL, *for the reason that the drawee has no higher or better knowledge of this* THAN THE PAYEE; NOR, INDEED, SO GOOD AN OPPORTUNITY AS THE PAYEE, *who, coming into immediate connection with the perpetrator of the fraud, and being directly connected with the* AMOUNT *of the bill, is in a* BETTER POSITION THAN THE DRAWEE *to know whether the check be raised or not;* and therefore the law requires that he exercise due and proper diligence in reference thereto, and that he know the party with whom he deals, or require him to identify himself.

Such a thing is done without any inconvenience and trouble, is usual among bankers, IS A PERFECT SECURITY AGAINST THIS WORST FORM OF FORGERY, AND THE ONLY POSSIBLE SECURITY THERE IS AGAINST IT.

The rule, therefore, requiring the payee to know, at his peril, whether the signature be the genuine signature of the drawer, just when it applied to banks, and highly proper as applicable to bank bills, has not uniformly been followed, for it has sometimes worked injustice—HAS NEVER BEEN FOLLOWED WHEN THE FORGERY WAS SIMPLY IN THE BODY situated to the parties in this case, and presented the same questions. It early gave notice of the necessity of bankers dealing with strangers upon large checks, that they could not fold their arms and throw the whole responsibility upon the bank upon which the check purported to be drawn; pointed out the only way that protection could be had in such cases, *and surely the only possible way in cases of this kind*, and required that he who took such check from a stranger should himself exercise all proper care and caution to protect himself and the bank upon which the check was drawn; and showing that he should do the identical thing here suggested or pay back the money which he had received under a mistake of fact, from the banker paying the check.

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OF THE BILL, because the reason that threw the responsibility of the genuineness of the signature upon the drawee does not and can not apply to the body of the bill, but in that particular apply more strongly to the payee, and require of him *that he use that diligence within his power to protect himself and the drawee* against this kind of forgery: as, for instance, the IDENTIFICATION of the party producing the bill or check.

THIRD. *The general rule making the drawee responsible for the signature of the drawer, does not apply to the body of the bill or check.*

The reason of the rule requiring the drawee to know the signature at his peril having failed, in such a case, the rule fails.

It is evident that unless such be the law, the usefulness of checks and bills of exchange is destroyed, and that bankers must either cease to use them, or throw around their use guards and impediments much more onerous *than the simple one that the payee, who comes into immediate intercourse with the rogue, and takes the bill payable to his own order from such rogue, shall obtain of the party information as to his right to the check, or require of him an identification.*

And such is now believed to be the settled law.

Bank of Commerce v. *Union Bank*, 3 Comst. 235.
Ellis v. *The Ohio L. Ins. & Tr. Co.*, 4 Ohio St. 647.
Goddard v. *Merchants' Bank*, 4 Comst. 155, 156.
Bank St. Albans v. *F. & M. Bank*, 10 Vt. 145.
Nat. Park Bank v. *Ninth Nat. Bank*, 55 Barb. 87.

These cases are all directly in point. And they show that the forgery, known as "raising," has existed so long as to require of bankers, who expect to be protected from it, the exercise of the means within their power.

The case of the *Bank of Commerce* v. *The Union Bank* presented these features. I quote the statement of facts:

> "On the 18th of December, 1847, the New Orleans Canal and Banking Company drew a draft on the Bank of Commerce, in New York, payable to the order of 'J. Durand,' for one hundred and five dollars. After the draft was issued it was fraudulently altered in several respects, and among others, by the substitution of the word 'thousand' for 'hundred,' and the name 'Bonnet' instead of 'Durand,' so that it appeared to be a draft for one thousand and five (instead of one hundred and five) dollars, and payable to the order of J. Bonnet (instead of J. Durand). In this altered condition, and bearing the indorsement 'J. Bonnet,' the Union Bank in New York received the draft from the State Bank of Charleston for collection, and credited the amount to that bank. The Bank of Commerce, on the draft being presented by the Union Bank, paid it to the latter. Two days afterward the Bank of Commerce received advices from the New Orleans Canal and Banking Company, and then ascertained the alterations in the draft. Thereupon the draft was returned to the Union Bank, and the money which had been paid demanded; but payment was refused." 3 Comst. 230, 231.

The Court charged the jury that if they believed the draft was thus altered and paid by the Bank of Commerce, they not knowing of the alteration, the plaintiff was entitled to recover. The defendant took the case to the Court of Appeals.

After stating the rule as to the signature, the Court say:

"But it is plain that the reason on which the above rule is founded does not apply to a case where the forgery is not in counterfeiting the name of the drawer, but in altering the body of the bill. There is no ground for presuming the body of the bill to be in the drawer's handwriting, or in any handwriting known to the acceptor. In the present case, that part of the bill is in the handwriting of one of the clerks in the office of the Canal and Banking Company in New Orleans. The signature was in the name and handwriting of the cashier. The signature is genuine. The forgery was committed by altering the date, number, amount, and payee's name. No case goes the length of saying that the acceptor is presumed to know the handwriting of the body of the bill, or that he is better able than the indorsers to detect an alteration in it. The presumption that the drawee is acquainted with the drawer's signature or able to ascertain whether it is genuine, is reasonable. In most cases it is in conformity with the fact. But to require the drawee to know the handwriting of the residue of the bill, is unreasonable. It would, in most cases, be requiring an impossibility. Such a rule would be not only arbitrary and rigorous, but unjust. The drawee would undoubtedly be answerable for negligence in paying an altered bill, if the alteration were manifest on its face. Whether it was so or not, in this case was properly submitted to the jury who found that it was paid by mistake and without knowledge of, or reason to suspect the fraudulent alterations. It would have been difficult to find otherwise upon the evidence, the bill having passed through the defendant's bank and the Charleston bank without suspicion. If the forgery had been in the name of the drawer, it might not perhaps have been incumbent on those banks to scrutinize the bill, because they might have relied on the drawee's better knowledge of the hand; but the forgery being in the body of the bill, the plaintiffs were not more in fault than the defendants.

"The greater negligence in a case of this kind is chargeable on the party who received the bill from the perpetrator of the forgery. So far as respects the genuineness of the bill, each indorsee receives it on the credit of the previous indorsers; and it was the interest and duty, in the present case, of the Bank of Charleston, to satisfy itself that the bill was genuine, or that its immediate indorser was able to respond in case the bill should prove to be spurious. The party who fraudulently passed the bill can not avoid his liability to refund on the pretense of delay in detecting the forgery, or in giving notice of it; and if reasonable diligence is exercised in giving notice after the forgery comes to light, it is all that any of the parties can require." 3 Comst. 236.

After referring to the reason for the rule requiring the party to know the signature, the Court say:

> "But in the present case, no such negligence is imputable to the plaintiffs, the plaintiffs being no more capable of detecting the forged alteration by inspection of the bill than either of the other parties." 3 Comst. 247.

In the case before the Court, it was a part of the case of the plaintiffs in error, that

> "The said alteration or raising having been so skillfully done as to be *impossible of detection by inspection of the check.*"

Who, then, had the best means, and indeed the only means of protection—the First National Bank of Cincinnati, whose agents knew nothing of the transaction, never saw the rogue, and had no right to require an identification; or Espy, Heidlebach & Co., who had all these means, and who, by usage, were required to take advantage of them?

Further on in the opinion, the Court of Appeals of New York say:

> "But the plaintiffs' right of recovery rests on equitable grounds. In *The Canal Bank* v. *The Bank of Albany*, the principle was recognized that money paid by one party to another, through mutual mistake of facts in respect to which both were equally bound to inquire, may be recovered back. The defendants here, as in that case, have obtained the money of the plaintiff without right, and on exhibition of

a forged title as genuine, the forgery being unknown to both parties. The defendants ought not, in conscience, to retain the money, because it does not belong to them, and for the further reason that the defendants and the previous indorsers have, each, on the same principle, their remedy over against the party to whom they respectively paid the money, until the wrong-doer is finally made to pay. *If that party should be irresponsible, or if he can not be found, the loss ought to fall on the party who, without due caution, took the bill from him.*

"In cases where no negligence is imputable to the drawee in failing to detect the forgery, the want of notice within ordinary time, to charge the previous parties to the bill, is excused, provided notice of the forgery be given as soon as it is discovered." 3 Comst. 237.

# This case stands on all fours with the case now before this Court. It is sound sense, and contains good legal discrimination upon the questions now under discussion. It is recognized and followed in many cases. *See cases cited on p. 60 of this brief.*

# See Cases referred to in the margin of p. 60

A little reflection upon the subject will show that to apply the rule relating to the signature to a case of this kind, would be establishing a mere arbitrary rule without any foundation in the nature of the thing itself, greatly injurious to the use of bills of exchange and checks in commercial transactions, leading to great frauds, and destructive of all confidence in commercial paper, while at the same time the greatest injustice would be done. It would be the setting aside those rules of law which throw the responsibility of commercial dealing upon the parties making and the getting profit thereof, and which make parties guilty of want of due care responsible for the loss due thereto.

The idea that the First National Bank of Cincinnati would be or was responsible for any opinion as to the raising of this check, or was expected to give any opinion upon *that* matter, or take any risk in reference to it, irrespective of the care taken by Espy, Heidlebach & Co., before they should take it, never entered the head of any person, and never would have done so, had it not been the necessity of this case; for it is reversing well-settled rules of law, throwing the responsibility of such transactions where they do not naturally belong, and introducing fraud, confusion, and want of confidence in dealing with commercial paper, and embarrassing all the rules of business in relation thereto.

How true is the latter part of the last quotation from the case of *The Bank of Commerce* v. *The Union Bank*, which places the responsibility of each transfer of such paper upon the party making it, in such a case as this, and so following it back to the rogue *and those who have, by their transactions with him and by their total disregard of the simplest rules of prudence in relation to a discovery of the forgery*, enabled him to commit the fraud!

A case has been decided in the Supreme Court of California, which is almost precisely like that before the Court. It is not yet reported in the regular reports, but I know the report of the same is substantially correct, from C. J. Rhodes, whom I met in California, in August, 1872, and who first called my attention to it.

This is the report of the case as found in the papers:

"We have now before us, furnished by a correspondent from San Francisco, the text of the opinion given by the Supreme Court of California, in the case of an altered check. The same has also come to hand in the columns of the Sacramento *Union*. The particulars have been already given. A stranger entered a broker's office in San Francisco, and asked the price in gold of $3,500 in greenbacks. He was told that the net cost would be $2,931.25. In half an hour he returned and presented the check of a well-known house for the amount specified. The broker, feeling a little suspicious, while his clerks were counting out the notes, sent around to the bank on which the check was drawn, to see if it was all right. His messenger told the bank that his employer knew the house which had signed the check to be all right, but as it was offered by a stranger, he chose to apply to the bank and be sure it was good. In answer to the question, 'Is that good?' which followed this explanation, the teller said it was 'all right,' and paid the money for it. The messenger returned to his employer just after the stranger had left, but to be sure of a recourse to him, had the check been disputed at the back, another clerk had followed him to a basement, where he disappeared. The check proved to be genuine as to signature, but raised from $30 to $2,931.25, and changed as to date and the name of payee. It was paid by the bank on the 12th of February, 1870, and its fraudulent character discovered on the 18th of March, when the broker who had the money was notified; but no formal demand upon him for the return of the money was made until the 9th of March, and the check itself was never returned or tendered to him. The drawer of the check brought suit against him, however, for the difference between the amount for which it was issued and the sum paid on it at the bank. There was a stipulation between the parties, that the Court might decide which of the three who were interested—that is, the drawer of the check, the broker who received it, or the bank which paid it—should bear the loss, precisely as if the suit had been placed in form for such verdict.

"The opinion in full was given by Crockett, J., but Wallace, C. J., Rhodes, J., and Belcher, J., all concurred. The Court decides that if the bank, as soon as the fraud was discovered, had tendered the altered check to the broker, and demanded the return of the money, he would have been holden for it, and between the three is to be the loser. And that it would make no difference if the check had been payable to bearer and the broker had not indorsed it."

That case is much stronger than the case before the Court. There the same expression was used, "all right," and the money actually paid.

This is the case to which the learned counsel refers on p. 37 of their brief.

The case of *National Park Bank* v. *Fourth National Bank* related to the sale of two sight drafts sold by the Ridgeway Bank of Springfield on the National Park Bank, which had been "raised," and first passed by the rogue to the Third National Bank of Nashville, for a valuable consideration, and by that bank forwarded to its correspondent in New York, the Fourth National Bank of New York, for collection, and by that bank collected of the National Park Bank.

The question is fully discussed by BARRETT, J., from whose opinion we take the following :

"The difficulty in disposing of the question thus presented consists neither in arriving at the justice and common sense of the case, nor in the obscurity of the underlying principle. It is debatable only because of the superficial consideration which the subject has received, and the absence of a guiding principle in one of the earlier English cases (*Price* v. *Neale*, 3 Burr. 1354), and because of some dicta in our own courts, in which subsequent criticisms upon that case, and indeed the whole tendency of modern English authority, are completely overlooked, and the doctrine of *Price* v. *Neale* is treated as well settled and unquestioned, and so far as certain *obiter* expressions go, is followed upon the principle of *stare decisis.*"

The Court further say :

"The Nashville Bank, when, through the defendants, it presented the bill in question to the plaintiffs for payment, was already robbed. The act had been accomplished

—the money was gone; and in its place the bank held a piece of paper, which, except to the extent of the twenty dollars and twenty cents, was absolutely worthless. Such being the condition of the bank, it presents that piece of paper to the plaintiffs, and the doctrine of *Price* v. *Neale* is that all the subsequent rights of the parties hinge exclusively upon the chance of the teller's failure then and there to detect the forgery. If the discovery be made, the defrauded party continues the loser; but if, by any to the one, happy, to the other, unhappy, accident, the discovery should not be made, the loss is immediately shifted upon the party paying; and the defrauded party, without the trouble of pursuing the thief, in effect recaptures this property by being restored to the precise pecuniary condition in which the swindler found him. Thus, without either consideration or consent advisably given, but by the purest accident, or, to put it at the very worst, by a piece of mere negligence, the drawer's title to his money becomes hopelessly and irrecoverably changed. To such reasoning I can never yield. One can well understand that if the drawee accept the bill, and upon the faith of such acceptance a party purchase the paper in good faith and for value, it would be inequitable to permit the acceptor thereafter to deny the genuineness of the drawer's signature."

After considering some of the English cases, and especially that of *Price* v. *Neale*, the Court say:

"It is difficult to perceive why the fact that the defendant had himself been robbed, should be put forward as a justification, in the forum of conscience, of his retention of another man's money.

"It is equally difficult to comprehend how, even admitting the deduction of fact, the legal title to property can be changed by, or made to depend exclusively upon, the one party's imprudence or the other's circumspection. The deduction, however, of the one's negligence, and the other's carefulness, by reasoning somewhat in a circle, is made to rest, not upon fact or evidence, but upon another and still more extreme legal proposition, a species of corollary to the first, from which, as a matter of law, and as a conclusive *sequitur*, the defendant's absolute freedom from negligence is sought to be established. This proposition, to quote the language of the opinion itself, is that, 'While it is incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand, before he accepted or paid it, it was not incumbent upon the defendant to inquire into it.

"If by the expression 'not incumbent,' a freedom from legal obligation were alone sought to be conveyed, it would be well enough—a party being under no compulsion to care for his own interests; but it is quite obvious from the context that this consideration was not distinguished from that of actual prudence. Now, the discounting of paper without inquiry, although no offense against law, does not so clearly indicate proper prudence as to justify its being so laid down as a positive legal rule, and consequently its withdrawal as a question of fact from the consideration of a jury. Yet such is the conclusion which inevitably results from the language used.

"It comes to this, therefore, that it was not incumbent upon the defendant to make any inquiry; that consequently, as a matter of law, it was not negligence to omit such inquiry, and, as a final sequence to this so-found freedom from negligence, coupled with the plaintiff's guilt in that respect, that the latter had lost all title to his money, which thus became, in justice and good conscience, the property of the defendant. These positions, whether viewed separately or in combination, are, to my mind, equally untenable, and the same may be said of the third ground, the fallacy of which would have been more apparent had the proposition itself been more accurately put; as, for instance, that there was no reason why the loss, which *had already been* 'thrown from one innocent man upon another innocent man,' should be thrown back where it originated. Everywhere is the same inversion of logic and principle, and that the case should have received even the sanction of a *dictum*, must be owing to the respect and confidence attached to a great name.

"The confusion brought about by this loose doctrine respecting negligence, and the effect of means of knowledge became so great, that in subsequent and clearly distinguishable cases, it was repeatedly invoked, and made the basis of an undoubtedly correct result, while plain principles, well settled and amply sufficient for the decision, were neglected and overlooked."

Further on, this judge says:

"But enough has been said to justify our premises that the extreme doctrine maintained in *Price* v. *Neale*, is not now the law of England; and such was evidently the opinion entertained by Mr. Chitty as late as 1840. See Chitty on B., 11 Am. ed., p. 431, where, after referring to the old rule, the following comments will be found: 'But, on the other hand, it may be observed that the holder who obtained payment can not be considered as having altogether shown sufficient circumspection; he might, before he discounted or received the instrument in payment, have made more inquiries as to the signatures and genuineness of the instrument, *even of the drawer or indorsers themselves.*'"

The Court further say:

"The conclusion naturally arrived at, upon a careful review of all these conflicting authorities and *dicta*, is, that no one clear and comprehensive rule has been laid down and followed, nor has any single principle been enunciated, the application of which would be sufficient for the accur rate and just solution of all questions which might arise upon the subject. Applying them, however, as best we may, two important features are found in the case at ba- which distinguish it from *Price* v. *Neale*, and bring it more nearly within the spirit which pervades the later cases. One is the actual negligence which, as a matter of fact, is chargeable to the defendants' correspondents, the Nashville Bank, and the other is the lessened attention which the circumstances attending the presentation and payment of the bill naturally superinduced. The averment upon the former head, in effect, charges the Nashville Bank with having purchased the bill from the swindler in person, who was a total stranger, without scrutiny or inquiry. Such is the import of the statement, taken in its entire scope, and, of course, unexplained by the demurrer, that the bank discounted the bill for the person calling himself by the fictitious name of E. G. Fanchon. Nor, while in this connection, must we overlook the responsibility for alterations in the amount (*Bank of Commerce* v. *Union Bank*), and for the authenticity of every other signature upon the bill (*Merchants' Bank* v. *McIntyre*, 2 Sandf. 431), which, as a matter of law, is ordinarily fastened upon the holder or the party presenting the draft for payment, and which is claimed with much force to be applicable here, upon the ground that however the main question may be viewed, the case should at least be determined as though the drawer's signature were in fact genuine, the payment, at the worst, amounting to but an inviolable admission to the genuineness of such signature."

FOURTH. *The record as bearing upon this question.*

Before closing this part of the brief, I desire to say one word as to the record. The bill of exceptions being prepared by the plaintiffs in error, to enable them to raise questions to reverse the action of the Court below, is to be construed most strongly against them.

And it will be presumed that they have stated it as strongly in their favor as the facts would permit, and that nothing took place at the trial that would weaken the statements in the record which work against them, that they have not brought into the bill of exceptions.

As against them, it will be taken as a fact that the alteration or "raising" was

"So skillfully done as to be impossible of detection by inspection of the check."

It will also be taken, as a fact, that the stranger informed them that they had "dealings with Stall & Meyer, and would have to go to their store for a check, and might be absent one or two hours; that in about two hours he returned and produced the check in question," payable to their order; that it was one of Stall & Meyer's blank forms then used by them, with the regular number then reached by them, with the real signature of Stall & Meyer.

It will also be taken as an admitted fact, that when the check was presented to Sandford—

> "He was requested to examine it very particularly, and that he then examined it very particularly, comparing it with other checks of Stall & Meyer, and with the signature book, and examining the amounts to their credit on the books of the bank" (thus showing what was expected of him); "that after a partial examination he said he was not very well acquainted with Stall & Meyer's checks, as the account had been transferred from the Central Bank but a short time, and he then continued such examination, at the end of which he returned the check, saying it is all right." *Record*, p. 8.

It will also be taken as an admitted fact, that the messenger who returned with the check to Espy, Heidlebach & Co. did not inform Jenny that Sandford said he was not very familiar with Stall & Meyer's checks.

All this, *as against the plaintiff in error*, will be taken as admitted in the case, as they endeavored to prove it.

AND INASMUCH *as there was no evidence to the contrary, or any attempt to produce any*, it will also be taken as a fact in the case, that there was a usage in Cincinnati, at the time, limiting the meaning of the words "good," "all right," to the genuineness of the signature and the state of the account, for it is testified to by four experienced bankers, and there was no attempt to disprove it.

It will also be taken as a fact in the case—

> "That although there was a usage for one bank to which a check was offered, to send to another bank, upon which it was drawn, to know as to the genuineness of the

signature and the state of the account, *there was no usage as to their sending to inquire, or of a banker's passing upon the filling up, or whether the check had been raised or not,* AND THAT IT WAS IMPOSIBLE TO DETECT A RAISED CHECK, OR TO TELL WHETHER IT WAS RAISED OR NOT. When the messenger, Schwarzenberger, presented the check, *their attention was not called to the filling up*, nor was any question asked in reference to that, nor was any statement made by the messenger that they would, in fact, take the check, or were going to take the check; nor did *the plaintiff* know what the transaction between the defendants and said stranger was, nor that it would be consummated," . . . nor did the plaintiff know that the defendant had, in fact, taken the check until it came to it in the regular process of collection through the clearing-house."

All this for the purposes of this hearing must be taken as admitted in the case, for there was evidence tending to prove it, and nothing tending to show the contrary. And it will also be taken as admitted that there was a usage at Cincinnati, at the time when checks of the kind in controversy were presented to a banker, he did not take them without learning who the drawer was, or inquiring in relation thereto, for this is testified to by Goodman, Bissell, Griffith, Stanwood, and Sandford, all bankers of large experience, and no evidence tending to prove the contrary.

The rule of practice construing the record most favorably to the defendant in error, taken in connection with the rule which prevents the whole evidence being made part of the record, would seem to result in this, and the peculiar frame of this bill of exceptions would tend to the same conclusion. There is also another well-established rule applying to this same matter. It is that the proceedings of a court of record are presumed to be correct until the contrary is made to appear; and where evidence may have been given that would make the rulings of the Court below right, and there is nothing in the record showing that no such evidence was given, the evidence is in favor of the record presumed to have been given.

The rule is thus stated in *Murray* v. *Fry*, 6 Ind. 373:

> "When the evidence is not in the record, the Court will go a great way to sustain the judgment of the Circuit Court. If, upon any probable state of facts, the instructions complained of would be correct, the existence of such fact will be presumed. But if the instructions are in themselves radically wrong, under any state of facts, directing the minds of the jury to an improper basis on which to place their verdict, it would be hazardous to presume that the jury had, notwithstanding such erroneous instructions, arrived at a correct conclusion." 6 Ind. 373.

See also

State v. *Hopkins*, 5 R. I. 59.
Russell v. *Ely*, 2 Black, 580.
Henry v. *Norse*, 54 Maine, 259.

Take the facts asserted by the plaintiffs in error even, and the generally admitted surrounding of this case, with those usages and rules of prudence now generally recognized or apparent, in relation to the use of commercial paper in reference to this kind of forgery, and it is clear that the plaintiffs in error were liable for the money thus paid them by the First National Bank of Cincinnati, and that the judgment must be affirmed on that ground, irrespective of any other questions involved in the record.

For this reason I shall not undertake to answer all the errors assigned, as, though assigned, they are not specially pointed out or relied upon.

It being clear, from the statement of the case made by the plaintiffs in error in their bill of exceptions, that Sandford made a most careful examination of the check and gave an honest opinion thereon, and that everything he could pass upon was as he stated it—that it was impossible for him to ascertain or know anything in relation to the "raising" of this check, and that the plaintiffs in error had a simple, easy, and perfect way of ascertaining the fact, dictated by necessity and the commonest rules of prudence, and of protecting themselves and others to whom they should transfer the check or get the money from upon it, the case is a clear and conclusive one, entitling the plaintiffs below to the judgment entered below.

This Court, therefore, need not trouble itself with all those twenty-four assignments of error, for in this view of the case many of them are entirely immaterial, and could not have prejudiced the plaintiffs in error.

The whole case shows that a state of fact is such that, upon any subsequent trial, the same judgment must be the result, in which case there will be no reversal, no matter what errors have intervened.

FIFTH. *There was no estoppel in pais arising from what Sandford said to Schwarzenberger.*

It is next claimed that though there was no estoppel from the special rules established upon the subject relating to negotiable paper, yet that there was an estoppel arising from the statement of Sandford, "good," "all right," upon the common rules relating to such estoppels. This is the real question in the case, and we deny that there is any such estoppel. The case lacks several of the essential elements of such an estoppel, which I shall here state.

First. It is evident from what appears in the record, that the particular matter which produced the inquiry in this case, was not submitted to Sandford, and he did not pretend to pass any judgment or opinion upon it. The record does not show that he was requested for any opinion upon this point, or that he undertook to give any. It clearly shows that neither party had any such idea in view at the time. The usage of asking a banker upon whom a check purports to be drawn as to the check, went no further than the signature and the state of the account, and that was what Sandford attended to in the presence of the messenger of the plaintiffs in error. He was not requested to pass upon anything else, and it is evident that if he had been so asked, he could not have done it.

Espy knew that, as he was an old banker. He did not, in fact, think, at the time, of the filling up being false. If he had, he would not have sent to the First National Bank to have learned this fact, but to Stall & Meyer; for he knew that the First National Bank could give him no better knowledge than he himself had—in other words, could tell him nothing about it, and therefore did not ask Sandford anything relating to it.

The answer "good," "all right," could not have been relied upon as affecting the amount of the check, or the body of the bill. It is clear from the record that it was not.

Second. The forgery being a part of the name of the plaintiffs in error, requiring them to give currency to the bill, and to pass title as has been stated, takes this case from under any of the cases heretofore decided, even as to the signature. There is no case reported making the drawees responsible, except where the bill or check has got into the hands of an innocent indorsee for value. The rule as to the signature has never been applied as between the original parties to the bill, and therefore the necessity of the plaintiff in error to make it a case of *estoppel in pais* under the ordinary rules of such estoppels.

Before such an estoppel can be effective, there must be nothing in it connected with the party setting it up to mislead the party attempted to be estopped, and the latter must have all the information possessed by the former. Now, the fact that this check was payable to the order of Espy, Heidlebach & Co., and their name was thus directly connected with the amount of the check and required them to give currency to it as a check for that amount, would tend to lead Sandford to direct his attention especially to those matters of which he had better knowledge than Espy.

He could come to no other conclusion than that Espy knew the real amount of the check. The record shows that Sandford was not told anything about the transaction, how the check came to be payable to Espy, Heidlebach & Co., or that the party had said he should be absent from one to two hours, to get a check, which, by the ordinary course of business, would have been payable to him—and appeared at the end of two hours (when in ten minutes the whole could have been accomplished) with a check, not payable to his order, but to the order of Espy, Heidlebach & Co., and that the transaction was not such as the check indicated, or one between Stall & Meyer (a well-known house) and Espy, Heidlebach & Co. This presents Espy, Heidlebach & Co. in a much worse position than was Bishop and the paying-teller of the Trust Company, in the case of *Ellis* v. *The Ohio Life Ins. and Trust Co.*, 4 Ohio St. 648; for there, there were, in fact, no suspicious circumstances surrounding the case as it appeared to Bishop: whereas the presenting a check under such circumstances payable to the order of Espy, Heidlebach & Co. was a suspicious circumstance, of which Sandford had no knowledge. The First National Bank can not be estopped, therefore, by Espy, Heidlebach & Co., in this matter, as they had better means of knowledge than had Sandford, and they did not communicate all the knowledge they had to Sandford. A party who has the means of knowledge or equal means of knowledge, can not estop the party who has acted in good faith and has given an honest opinion. This rule is thus stated by CH. J. FIELD, in the case of *Biddle Boggs* v. *Merced Mining Co.*, 14 Cal. 368:

> "It is undoubtedly true that a party will, in many instances, be concluded by his declarations or conduct, which have influenced the conduct of another to his injury. The party is said, in such cases, to be estopped from denying the truth of his admissions. But to the application of this principle with respect to the title of property, it must appear, *first*, that the party making the admission by his declaration or conduct, was apprised of the true state of his own title; *second*, that he made the admission with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud; *third*, that the other party *was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge*, and, *fourth*, that he relied directly upon such admission, and will be injured by allowing its truth to be disproved."

Commonwealth v. *Stoltz*, 10 Penn. St. 531.
See *Ellis* v. *Ohio Life Ins. and Tr. Co.*, 4 Ohio St. 661.
Stevens v. *Dermett*, 51 N. Hamp. 335, 336.
1 Story Eq. Jur., sec. 386.
McKinsey v. *Steele*, 18 Ohio St. 41.

Other cases show that a party must use the knowledge he has, or which is fairly within his reach, before he can estop a party who has acted fairly.

Commonwealth v. *Stoltz*, 10 Penn. St. 531.
Riddle Boggs v. *Mer. Mining Co.*, 14 Cal. 365.

But it is as to fact that an estoppel applies, or in reference to certain things where the law has thrown the responsibility upon a party requiring him to know the fact. Such as the genuineness of the bills of a bank, the genuineness of a party's own signature, or that of his depositor or correspondent.

Beyond such facts the law never estops a party by an honest opinion given a party upon his request.

To estop under such circumstances there must be some sinister purpose in the opinion given.

Indeed, it may be alleged as a general rule, to which there is no exception but those above alluded to (where the law has, for special reasons, thrown the responsibility upon some party), that there must either be fraud or bad faith, or such gross negligence as amounts to a disregard of moral duty, or where the proof of the facts would work a fraud upon the party.

Except in the cases above alluded to, there is believed to be no exception to the rule as above stated. It is announced so often and in so many cases, and is withal so well recognized, that I shall refer to but a few of them.

Commonwealth v. *Stoltz*, 10 Penn. St. 531.
McKenzie v. *Steele et al.*, 18 Ohio St. 41.
Biddle Bogg v. *Merced Min. Co.*, 14 Cal. 367.
Pickard v. *Sears*, 6 Ad. & El. 474.
Swain v. *Seamen*, 9 Wal. 274.

Copeland v. *Copeland*, 28 Maine, 540.
Hackett v. *Callender*, 32 Vt. 105.
Martin v. *Angel*, 7 Barb. 409, 410.
Jewett v. *Miller*, 10 N. Y. 406.
Freeman v. *Cooke*, 2 Exch. 662.

The essential doctrine was long ago settled in England in *Pickard* v. *Sears*, which, with the qualification or explanation found in *Freeman* v. *Cooke*, is in accordance with the above statement, and has pushed the doctrine as far as it can well go.

In the case last named, the Court say:

> "By the term '*willfully*,' however, in that rule" (the rule announced in *Pickard* v. *Sears*), "we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he *means* his representation to be acted upon, and that it is acted upon accordingly." 2 Exch. 663.

By this rule even there could be no estoppel, for it can not be claimed that Sandford meant to pass upon the filling up of the check, or that he did so, as he supposed, and must have supposed, the plaintiff in error knew all the facts about that, and he, Sandford, knew none of them, could not have known any of them; and the record shows that Espy, Heidlebach & Co. did not rely upon anything said by him as affecting that question.

In a case subsequent to *Freeman* v. *Cooke*, in the Queen's Bench of England, *Howard* v. *Hudson*, 2 El. & Bl. 13, CROMPTON, J., says:

> "I think it would be dangerous if we were to extend the principle by which a party is precluded from denying a representation to such a case as this.' I do not think that an estoppel of this kind is always odious; in many cases I think it extremely equitable to act upon that doctrine.

But I think that every case, in which we are to act upon it, must be brought within the principles so accurately laid down in the elaborate judgment in *Freeman* v. *Cooke*, 2 Exch. 654, and in the present case there is, on the finding of the jury, a want of the two great ingredients; for it is not found that the defendant intended that the plaintiff should act on the faith of the representation, nor that the plaintiff did so act. The word 'willfully,' which is used in the judgment in *Pickard* v. *Sears*, has been well commented upon in the judgment in *Freeman* v. *Cooke*. As the rule is there explained, it takes in all the important commercial cases in which a representation is made, not willfully in any bad sense of the word, not *malo animo*, or with intent to defraud or deceive, but so far willfully that the party making the representation on which the other acts means it to be acted upon in that way. That is the true criterion."

Now, clearly, Sandford made no declaration in the case as to the body of the bill, that he meant Espy, Heidlebach & Co. to act upon, as with reference to that he was asked nothing, and he must have supposed, and did suppose, that they knew all about that. *A party can not call upon another for an opinion in reference to a matter of which he knows that that other can give no certain knowledge, and then estop him, when the opinion has been a fair and honest one.*

The qualification of the rule in *Pickard* v. *Sears*, by the cases last named, is simply this: that though it may not require that the party estopped has purposely *misled* another to his injury, yet that the case shall be one in which he intended the party should act upon his statements, and one in which to permit him to deny them would operate as a fraud upon the other party. No case has gone beyond that point, and in the case last referred to from the Queen's Bench, a feeling was expressed by CROMPTON, J., that there was danger in pressing this doctrine of estoppel *in pais* too far.

Sandford was asked a question, which the usage, in connection with what passed at the time, led him to believe that the genuineness of the signature and the state of the account was wanted. He carefully examined these matters, and saw nothing about the check suspicious, and made the reply he did, which this record shows could have been understood as applying to the signature and the state of the account only. To press this matter further would destroy a valuable usage now in existence, for no banker could pronounce any opinion whatsoever in such a case. Indeed, it may be said, *that a mere opinion upon a matter of this kind, if honest, can not be predicate of an estoppel in pais. It is inconsistent with the essential doctrine of an equitable estoppel to make it so.* The true rule upon this subject is expressed in a case in Pennsylvania, by Mr. Justice BELL. He says:

> "It is now established that, in all cases where an act is done, or a statement made by a party, the truth or efficacy of which it *would be a fraud*, on his part, to controvert or impair, the character of an estoppel shall be given to what would otherwise be mere matter of evidence." *Commonwealth* v. *Stoltz*, 10 Penn. St. 530.

After considering *Pickard* v. *Sears* and many other cases, he says:

> "In all these cases there is some ingredient which would make it a fraud in the party to insist on his legal right; per Sergeant, J., in *Crest* v. *Jack*, 3 Wal. 238. It is the presence of *this fraud, either in the intention of the party, or the effect which would be worked by permitting him a negative*, that distinguishes this species of estoppel from what was so considered by the old common law. But it is obvious there can be no such fraud where the purchaser or other actor was, or ought to have been, acquainted with the

subject of his action, or even had the means of knowledge and neglected to avail himself of them." 10 Penn. St. 537.

In a late case in Ohio, where this doctrine had been carried as far as in England, the Court say:

> "To work an *estoppel*, there must be prejudice to the setting it up, and also *fraud* or bad faith, or their equivalent, gross negligence in the party to be estopped." 18 Ohio, 41.

This is the decision of the Supreme Court of Ohio after the cases cited by the learned counsel in their brief, on page 34, and it shows what the circumstances must be where no fraud is intended, in order that an estoppel may be relied upon. They must be such as would work a fraud upon the other party, and such as in equity and good conscience ought to close the mouth of the party attempting to show the contrary. All this is involved in the sentence quoted from the opinion of this Court, in the case of *Swain* v. *Seamens*, 9 Wal. 274, given by Mr. Justice CLIFFORD, in these words, to wit:

> "Where a person tacitly encourages an act to be done, he can not afterward exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim." *Swain* v. *Seamens*, 9 Wal. 274.

This is a rule directly against low cunning and cheats brought about by acts, words, or by language to which a double meaning may be attached; or by mere silence where good faith requires the party estopped to speak, or in the vulgar language, by "lying low."

I have carefully examined all the cases cited by the learned counsel, and have often had the subject under examination, and I can find no case inconsistent with the rules as I have above stated them—the matter as to the genuineness of the signature being, for other and special reasons, an exception to the rule.

Where no fraud was intended, it must be a case where it would be a fraud for the other party, the party estopped, to insist upon his legal rights.

The cases cited by the learned counsel are not inconsistent with this view of the law.

One of these cases, *Stevens* v. *Donnett*, 51 N. H. 355, that carries this doctrine as far as any, quotes approvingly the following, from 1 Story's Eq. Jur., sec. 386:

> "To justify the application of this cogent moral principle, it is indispensable that the party so standing by and concealing his rights should be fully apprised of them, and should, by his conduct or gross negligence, encourage or influence the purchase; for, if he is wholly ignorant of his rights, or the purchaser knows them, or if his acts or silence or negligence do not mislead, or in any manner affect the transaction, there can be no just inference of actual or constructive fraud on his part."

In the case of *Stevens* v. *Donnett*, the jury found "gross negligence," but negatived "bad faith," in the conduct set up as an estoppel. The Court say:

> "Indeed, the doctrine seems to be well established by authority, that the conduct and admissions of a party operate against him *in the nature of an estoppel, whenever in good conscience and honest dealing he ought not to be permitted to gainsay them. Thus negligence becomes constructive fraud,* although, strictly speaking, the actual intention to mislead or deceive may be wanting, and the party may be inno-

cent, *if innocence and gross negligence may be deemed compatible*, and in such cases the maxim is justly applied to him, that where one of two innocent parties must suffer, *he shall suffer, who, by his own acts, occasioned the confidence and loss.*" 51 N. H. 335, 336.

Now, apply the above to the case before the Court. There was no claim that there was any negligence on the part of Sandford. All that he was expected to know and speak of, was precisely as he stated it.

And pray who was the party here WHOSE ACT AND CONFIDENCE *occasioned the loss?*

It was Espy, Heidelbach & Co. who dealt with the rogue, took the check payable to their own order, and made no inquiry of him as to his right to it, or who he was, and without sending to Stall & Meyer, *who were the only parties, as they knew, who could give any information as to the matter in controversy.*

See *Ellis* v. *The Ohio Life Ins. & Tr. Co.*, 4 Ohio St.
Bank of Com. v. *Union Bank*, 3 Comst. 236.
Nat. Park Bk. v. *Fourth Nat. Bk.*, 7 Abb. Pr. N. S. 143.
See the California case before mentioned.
Jones v. *Ryde*, 5 Taunt. 495.

Near the close of their brief, the learned counsel, quoting the maxim, that where one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss, must sustain it, from the opinion of ASHURST, J., in *Lickbarrow* v. *Mason*, 2 T. R. 70, they say:

"Admit that both were equally innocent, equally diligent, yet one must suffer. Which ought it, in justice, to be? Had Sandford refused to answer, or said, 'Inquire of Stall & Meyer,' or, 'The amount stands to their credit, and the signature is genuine,' there would have been no dispute. He chose not thus to limit his assurance, but preferred rather the enlarged statement, 'the check is good;' not 'the signature and amount,' but 'the *check* is good, or *all* right, send it through the clearing-house.'"

The answer to all this (and this is the whole gist of the argument) is plain.

The party who enabled the rogue to commit the fraud, was clearly Espy, Heidlebach & Co. It was they who dealt with him under such suspicious circumstances, without any inquiry of him as to his right to the check, or any identification; it was they only who saw him, or had any chance to make these inquiries. They were beyond all question negligent. Whereas, it is not claimed or charged that Sandford ever saw the man, had anything to do with or for him, or was guilty of any neglect, want of care, or even made any error in judgment upon any matter, which he was either expected to pass upon or could pass upon.

And what obligation was Sandford under to tell Espy, Heidlebach & Co. to inquire *about the* filling up on this check? Why, Sandford supposed the dealing out of which the check grew, was with Stall & Meyer, though the same was presented to Espy, Heidlebach & Co. by a stranger. He so swears, and he had a right so to think from the character of the check, it being payable directly to Espy, Heidlebach & Co.; and the last thing that would be likely to occur to him, was the idea that the whole of the filling up, making it a check for $3,920 and payable to their order, was a forgery, and therefore would not be likely to think of such advice. But why advise Espy, Heidlebach & Co. upon such a matter? They were old bankers, and knew as well as he did what to do; and situated as they were, should have known much better, for they knew that the rogue was gone two hours to get the check, and then presented one, not such as would usually be given by Stall & Meyer, having no money to pay them, but money to pay another person with whom they were dealing. Sandford was not called upon to give any advice.

The making the word "all" in the term "all right" (the same being a common expression see the California case, p. 80, this brief, meaning that the signature and state of the account were right, and meaning nothing more—being a mere expression) emphatic, as though it was intended to cover the matter in controversy, or as though Epsy, Heidlebach & Co. so understood it at the time, is the forcing a part of a common expression to mean what it is clear from this whole record that it was not intended to mean, and what neither party understood it to mean at the time.

The case is argued in the brief of the learned counsel upon the idea that this Court will follow the decisions of the Court of Appeals of New York, and of the Supreme Court of California, in reference to raised checks, to the effect that a bank upon which such a check is drawn may recover it back from a bank to whom it was paid, if paid without knowledge. See their brief, p. 37.

If this be the law, and there can be no fair doubt of it, how stands the case?

It was a part of the case of the ~~defendants~~ plaintiffs in error in the Court below, that the forgery was so skillfully done as to be incapable of discovery from an examination of the check. It is also a part of their case, that Sandford, after telling them that he was not very familiar with Stall & Meyer's checks, made a most careful examination of it, and that in nothing in reference to which he had superior knowledge over Epsy, Heidlebach & Co., was he in error. What then is the conclusion from maxim cited, that where one of two innocent parties must suffer by the act of a third person, that he who enables such person to occasion the loss should be the sufferer.

It most clearly and certainly throws it upon the plaintiff in error, as he is the only party to whom it has any application whatsoever. The facts on the record which the plaintiffs in error insisted upon below, and which they can not here deny, are such that the case is clearly for the defendants in error, and that in any other trial the result must be the same.

The cases cited show that the action lies as here brought, and the learned counsel admit that if the Court follow the cases in New York and California, as they suppose they will, that the judgment below is right, unless the plaintiffs in error are protected by the doctrine of equitable estoppel.

Objection is made, however, in another part of their brief, that the plaintiffs below could not recover the money as paid under a mistake of fact. But all the cases, both those cited in this brief by us, and those cited by the learned counsel, show the right of recovery under such circumstances. See, among others, the following: *Canal Bank* v. *Bank of Albany*, 1 Hill, 287; *Bank of Commerce* v. *Union Bank*, 3 Comst. 230; *Ellis* v. *O. L. Ins. & Trust Co.*, 4 Ohio St. 648; *Kelley* v. *Solari*, 9 Mees. & Wels. 53; *Kountz* v. *Canal National Bank*, 51 Miss. 279.

In conclusion, let me ask what justice is there in permiting Espy, Heidlebach & Co. to keep the money in controversy? They paid the bank nothing for it, and the bank was under no obligation to them in relation thereto. They came into direct intercourse with the rogue and had the profit of the transaction out of which the check grew. They had an easy and effectual mode of protecting themselves from the fraud without difficulty, ordinarily suggested to and followed by bankers, situated as they were, to such an extent as to ripen into a usage.

Whereas the First National Bank had no connection with or profit from the transaction, no connection with the rogue, or chance to protect themselves by requiring of him an identification. They were in no way negligent in reference to the check, and gave an honest opinion in relation thereto. What more could they have done?

The rule established to give confidence in bills of exchange, and aid in their free circulation, relate to *real* bills and not to *forgeries*. Everthing should be done that is fairly possible to prevent the circulation of the latter, for it is only by such means that any confidence can be had in banking and commercial transactions. Instead of aiding Swartwouting and dishonest cashiers to rob their banks, instead of aiding forgers in combination with men of vicious but unascertained character, to rob honest merchants and bankers, by rules adopted for honest business and commercial dealing, every possible impediment should be put in the way of the circulation of forged paper, and to throw around banking and honest dealing some protection. It is now apparent from this and many similar transactions which have lately filled the Courts, that there is, and can be, but one means of protection against this worst form of forgery —and that is, by requiring of each party who may deal with such paper, to know the party with whom he deals *at* HIS *peril*. This is a simple rule, easily followed, and entirely effective, and in no way inconvenient or injurious to efficient business, but conducive thereto, and is consistent with analogous rules relating to employment of, or the dealing with persons in reference to other property and affairs.

Surely, it can not be too much to endeavor to prevent somewhat the vast amount of fraud now being accomplished by means of certified and fraudulent and false checks and bills, by those rules which experience has shown conducive to commerce and fair dealing in commercial paper, by requiring certifications to be in writing, and therefore deliberately and knowingly made, and by requiring those dealing in and taking forged paper, each to know the party with whom he deals, so that the matter can be traced back by each to the guilty party. See

Bank of Com. v. *Union Bank*, 3 Comst. 237.
Ellis v. *O. L. Ins. & Tr. Co.*, 4 Ohio St. 666, 667.

When this simple rule, heretofore frequently suggested, and now generally followed, is enforced by the Courts, then, and not till then, will the community be protected against such great and growing frauds as are now being practiced.

We claim, therefore, that the judgment of the Court below must be affirmed.

All of which is respectfully submitted.

T. D. LINCOLN,
Of Counsel for the Defendants in Error.

Superior Court of the City and County of New York.

The Marine National Bank
vs.
The National City Bank.

Appeal from a Judgment. Heard November General Term, 1873. *Before Barbour, Chief J., Monell and Freedman, JJ.*

The action was to recover money paid under an alleged mistake of facts.

Lunt Brothers gave to a stranger their check upon the Marine National Bank for *twenty-five dollars*, payable to the order of Henry Smith. The next morning a person purchased gold of Derippe & Co., and offered in payment the same check, which had been altered, or "raised," to $4,679 96. Before delivering the gold, Derippe & Co. required the check to be certified. It was taken to the Marine Bank, and by it certified as "good." Thereupon Derippe & Co. received the check and delivered the gold. The check was indorsed by Derippe & Co., (the name of Henry Smith, the payee, having been erased, and that of Derippe & Co. inserted before they received it,) and deposited by them in the defendants' bank, and was cleared through the clearing-house the following morning. During the day the plaintiff discovered that the check had been altered, and demanded of the defendants a return of the money. The action was tried by a referee, who found the facts and gave the plaintiff judgment.

The defendants appealed.

Mr. Wm. Henry Arnoux for appellant.
Mr. Waldo Hutchins for respondent.

MONELL, J.—It is claimed by the appellant that the principle which controlled the decision of this court in the *National Bank of Commerce* against the *National Mechanics' Banking Association* (not reported) has no application to this case. In that case the check was certified *before* alteration; in this case it was certified *after* alteration. This difference, it is claimed, so distinguishes the cases that the present case is not embarrassed by a former decision.

In the case referred to a check for a small amount was certified by the bank. It was *afterwards* altered to a larger sum, and negotiated. It was paid by the certifying bank, through the clearing-house, without discovering the alteration. It having been found that the payment was made under a mistake of facts, it was held the certifying and paying bank could recover.

In this case, however, it is insisted that, by the certification of the check *after* its alteration, the bank incurred an obligation which estops it from claiming the benefit of a mistake.

It is conceded that had the bank, upon presentation of the check, paid the amount over its counter, it could recover. This is precisely in accordance with the *Bank of Commerce* v. *Union Bank*, 3 N. Y. R., 230, and the late case in this court of the same plaintiff against the National Mechanics' Banking Association. In the first of these cases a sight draft was altered after it was issued, and *paid* by the drawee in ignorance of the forgery; and it was held he could recover.

No greater effect can be given to a bank certification of a check than to the acceptance by the drawee of a bill of exchange. The obligation is the same in the two cases, (*Farmers' Bank* v. *B. and D. Bank*, 16 N. Y. R., 125; *Barnes* v. *Ontario Bank*, 19 *Id.*, 152, 159,) and in neither case does the obligation extend beyond a guarantee of the genuineness of the drawer's signature. It is not a guarantee that the *amount* is correct. (*Bank of Commerce* v. *Union Bank*, *supra.*)

The plaintiffs, by their certification of the check, are not estopped from showing the forgery of the amount, or the alteration of the name of the payee. The signature of the drawer was genuine, and there the obligation of the payee terminated.

There is nothing, therefore, in the contract of acceptance of a bill of exchange, or of the certification of a check, which can distinguish it from an actual payment, except so far as it may operate as an estoppel; and if a recovery can be had in the latter case, it can also be had in the other. It is the *mistake of facts* which enables a party to recover; and there can be no difference in principle between an actual payment of money under a mistake and the incurring of an obligation to pay money.

It is substantially found, and is undoubtedly true, that Derippe & Co. received the check in ignorance of the alteration, *and upon the faith of the plaintiffs' certificate;* and the defendants insist that the plaintiffs should be estopped from claiming, as against the defendants, the benefit of the mistake, upon the principle as well of estoppel as also that, when one of the innocent persons must suffer, the loss should fall upon the one who has been chiefly instrumental in producing it.

The reliance of Derippe & Co. was upon the *certificate written upon the check.* It conveyed to them the information (if it did not contain the obligation) that it was "good" for the amount specified in it. In ignorance of the alteration, that amount they took to be $4,679 96, and they parted with that sum to the holder, and received the check innocently and ignorantly.

Had no other rights intervened, doubtless the certifying bank could legally have claimed the benefit of the mistake. It could have insisted that it had merely guarantied the genuineness of the drawer's signature, and had assumed no obligation as to the amount inserted, and, having paid it under a mistake, could probably have recovered.

But I am of opinion that other rights had intervened, and that Derippe & Co. were authorized to rely upon, as they did rely upon, the certificate upon the check.

When it was presented, it purported to be payable to their order. It was payable to their order, and filled for the full sum of $4,679 96; and there was nothing to excite suspicion.

Yet Derippe & Co , before they would part with value, required the check to be certified. It was accordingly taken to the bank, the certificate put upon it, and then delivered to Derippe & Co. for its full amount.

A general definition of an estoppel *in pais* is thus given in *Continental Bank* v. *Bank of Commonwealth*, 50 N. Y. R., 575–581. "It is argued that there must have been some act or declaration of the plaintiff or of its agent to the defendant's assignors, which so affected the conduct of the latter to their injury as that it would be unjust now to permit the plaintiff to set up the truth of the case to the contrary of its mistaken act or declaration." In that case the certificate of the bank teller was a forgery. But the defendant, before receiving the check, caused inquiry to be made of the teller, who pronounced it "*all right.*" It was held that the bank was estopped, by the declaration of its teller, from questioning the genuineness of the certification. In that case the receiver of the check relied upon the *declaration* of the teller, and parted with value only upon such *declaration*. In the case before us Derippe & Co. relied on the act of the bank, and parted with value only upon such *act*. The declaration in the one case and the act in the other were both and equally made under a mistake, yet they must both and equally have the same effect. They equally affected the conduct of the receivers of the checks, and as Derippe & Co. were led by the act of the plaintiffs into the belief that the check was "good" for the whole amount, it must estop the latter from "setting up the truth to the contrary of its mistaken act."

I think also that, regarding the parties as equally innocent, the loss should fall on the plaintiff, as being the chief instrument in producing it. It innocently and under a mistake certified the check. It thereby induced the receiver to part with value. Without the certificate Derippe

& Co. doubtless would not have received the check, and would not have been injured, but receiving it on the strength of the certificate, the injury may be fairly attributable to the act of the plaintiffs.

There was nothing in the evidence to impair the entire good faith of Derippe & Co. There was nothing to excite suspicion or to put them on inquiry. In respect to the alterations of the check, both in the amount and in the name of the payee, the bank which certified it in its altered condition, and Derippe & Co., who afterwards received it, must equally be regarded as ignorant and innocent.

The plaintiffs being estopped by their act of certification of the check from alleging the truth as against Derippe & Co., are equally estopped as against the defendants, who received the check from Derippe & Co.

The learned referee arrived at a different conclusion, but not without much doubt and misgiving. He, however, thought another objection was conclusive, namely, that Derippe & Co. did not get title to the check, for the reason that the erasure of Smith's name and the insertion of Derippe & Co.'s was a forgery. It was no more a forgery than the alteration of the amount. Either rendered the check void as to the drawer. But it does not follow that, as between Derippe & Co. and the plaintiffs, the alterations in the check will impair their relative rights. Had the bank not paid the check, Derippe & Co. would have been remediless against the drawers. But I apprehend the quession between Derippe & Co. and the plaintiffs is quite a different one, and it does not lie with the latter to inquire into the former's title. It was certified after the payee's name had been altered, and in the condition it was as to the amount, and so came to Derippe & Co.

The same state of facts existed in *Bank of Commerce* v. *Union Bank*, *supra*. The payee's name had been altered. But the court put its decision on the ground of a payment made under a mistake of facts, not because the holder had no title.

I am of opinion that the conclusions of the referee were erroneous, and that his judgment should be reversed, the order of reference vacated, and a new trial granted with costs to the appellant to abide the event.

New York, *January* 9, 1874.

The foregoing is a copy of the original opinion on file in the office of the reporters of the Superior Court of New York.

James C. Spencer,
Samuel Jones,
Reporters.
per James C. Spencer.

[Indorsement.]

November G. T., 1873, *Marine National Bank* v. *National City Bank*, B. M. & F. Opinion—Monell, J. I concur, J. M. B., J. J. F.

SUPERIOR COURT, GENERAL TERM.

JANUARY, 1873.

MONELL, SEDGWICK, AND VAN VORST, *Judges.*

THE NATIONAL BANK OF COMMERCE, *Respondent,*
agst.
THE NATIONAL MECHANICS' BANKING ASSOCIATION, *Appellants.*

Appeal by defendant from a judgment entered upon a verdict of a jury under the direction of the judge before whom the case was tried, and from an order denying a new trial.

The action was brought to recover the sum of $14,949 25, claimed to have been paid by plaintiffs to defendants under a mistake of facts.

The case shows that Vermilye & Co. were dealers with plaintiffs, depositing money with them, and drawing checks against the same. On the 15th day of February, 1870, they drew a check, No. 101, on plaintiffs for $56 75. The check was made payable to the order of A. J. Greenleaf, to whom, or to whose use, it was delivered by Vermilye & Co. on the day on which it was drawn. The check was taken on the same day to the plaintiff, by a person purporting to be Greenleaf, the payee, and presented to be certified to Thomas B. Adriance, the receiving teller, but who on that day acted as paying teller, in the temporary absence of the paying teller. Adriance certified the check.

The plaintiffs kept a record of certified checks, and a book for the purpose, and in this book Adriance entered the check for $56 75 in question, as certified on that day.

Greenleaf, the payee of the check, was a dealer with the defendants. He had been introduced to the cashier as a banker and broker by a customer of the bank, and left with the defendants his card, with the number of his office thereon as 70 Broadway. He opened an account with the bank on the 1st of February, 1870, and from that time down to the 16th day of February, 1870, he had made divers deposits, amounting in the aggregate to over $56,000, and upon which he had from time to time drawn checks, so that, on the 16th February, when his account was balanced, there was standing to his credit only $1 49. On the day last named, and after his account had been balanced, Greenleaf deposited with the defendant the check of Vermilye & Co., which had been certified on the 15th February by Adriance, but which, after its certification, had been fraudulently changed in its date from the 15th to the 16th February, and altered in its amount from $56 75 to $15,006. The check was received by the defendants as genuine, and credited to Greenleaf's account at the sum of $15,006. Greenleaf afterwards, on the same day, further deposited with the defendants the sum of $5,600, (his last deposit,) and on the same day drew out of the bank by his checks the sum of $17, 981 25, leaving an apparent balance in his favor on that day of $2,626 24.

The defendants, having no knowledge of the forgery in the body of the check, deposited the same in the clearing house on the morning of the 17th day of February, where the same was paid to the defendants by the plaintiffs, as a check for $15,006, through the exchange in the clearing house, in the ordinary way in which the accounts of banks are there adjusted, and the same actually came to the plaintiffs' banking house on the morning of the 17th February, with other vouchers.

The check came from the clearing house to William W. Sherman, who was the regular paying teller of plaintiffs' bank, who was absent from the bank on the 15th, the day the check was certified. It was brought to Sherman by the check clerk, as not being entered as a certified check on the certificate book. Sherman looked at the book and saw no entry of the check. He made no inquiries of Vermilye & Co., nor of anybody in the bank, but knowing the signature of Adriance, and supposing the check to be genuine and regularly certified, and its entry on the 16th accidentally omitted, he entered the same upon the book as a check certified of the 16th, for $15,006, and the same was charged to the account of Vermilye & Co.

In this condition the affair remained until the 24th of February, when the account of Vermilye & Co. with the plaintiffs was written up, and the vouchers, including the check of $15,006, were returned to Vermilye & Co. On the 1st March Vermilye & Co., having in the meantime examined the vouchers, called upon the plaintiffs, produced the check, and notified the bank that the check had been altered, after drawn by them, from $56 75 to $15,006. Whereupon the plaintiffs addressed to the defendants a letter in these words:

NATIONAL BANK OF COMMERCE,
NEW YORK, *March* 1, 1870.

M. CHANDLER, Esq.,
Cashier National Mechanics' Banking Association:

DEAR SIR: I inclose herewith check of Vermilye & Co. upon this bank, No. 101, to order of A. J. Greenleaf, purporting to be for fifteen thousand and six dollars, ($15,006,) received for that amount through the clearing-house exchange from your bank, as per your slip, also inclosed herewith, which check we have this day learned has been altered from $56 75, the amount for which it was drawn and certified by us, and I therefore hereby claim and require repayment to us of the difference of $14,949 25.

Yours, very respectfully,
H. F. VEIL, *Cashier.*

This was the first actual notice the defendants had of the forgery. The defendants' cashier immediately sent a clerk to 70 Broadway, to make inquiries for Greenleaf, but he was not to be found there. The office was closed, and no person on hand. The balance in the hands of the defendants, $2,626 24, has, since the 17th of February, been attached.

At the close of the testimony the defendants' counsel requested the court to submit to the jury the question, whether the defendants had been injured by the laches or negligence of the plaintiffs, in notifying the defendants of the alleged mistake.

The court refused, and the defendants excepted.

The court directed a verdict for plaintiffs for the sum of $14,949 25, with interest, being the difference between the amount for which the check was originally drawn and certified, and the altered amount; defendants excepted to such direction. Defendants moved for a new trial, which was denied.

James Emott for appellants.

Benjamin D. Silliman for respondents.

Van Vorst, J.—When the check, in the altered condition in which it had been taken by the defendants as genuine, came back to the cashier of the plaintiff's bank, on the 17th day of February, it was there also received as genuine, and its payment, through the exchange at the clearing-house, was adopted and ratified, and as a valid check it was charged to the account of Vermilye & Co., the drawers of the same.

The alteration being in the body of the instrument, and not in the signature of their customer, which they were presumed to know, they are not, by the act of recognition and payment of it as valid, under an honest belief that it was so, disentitled from establishing that the instrument was a forgery, or from receiving back the money paid.

Bank of Commerce *v.* Union Bank, 3 Comst., 230.

The plaintiffs, on the 17th day of February, were deceived by the fraudulent alteration of the check, as the defendants themselves had been on the 16th, and the recognition by each bank of the check as valid was made under a clear mistake of facts. No effect can be given to the certification of the check on the 15th February by Adriance, the clerk of plaintiffs, other than that the signature was genuine, and that the check was good for $56 75, the amount for which it was drawn, (Farmers' and Mechanics' Bank *v.* Butchers' and Drovers' Bank, 16 N. Y., 125,) and the money paid by plaintiffs over and above that sum they are entitled to recover back from the defendants, unless there be such facts and circumstances peculiar to this case as would justify the defendants, according to equity and conscience, to detain it from the plaintiffs. The defendants claim that the plaintiffs have been guilty of laches, which has resulted in loss to them, and that this negligence of plaintiffs should defeat a recovery. It was urged on the argument by defendants' counsel, that it was negligence in the plaintiffs not to have entered the check when certified by its number, in addition to its date and amount; that the entry of the number would have aided in detecting the forgery; and further, that when the check came back to them on the 17th February, they did not make sufficient inquiry in regard to its genuineness before accepting it as a true instument. The defendants urge substantially that the plaintiffs could and should have detected the forgery on the 17th February, and should have immediately given notice thereof. The evidence on the trial was to the effect that it was not customary to enter certified checks on the books by their number, but that memoranda of the dates and amounts were sufficient for the purposes for which the book was kept.

The question as to whether or not the omission of plaintiffs in this respect was negligence, was not submitted to the jury, nor was any request made that it should be, and it cannot be said as matter of law that the plaintiffs were bound to make such entry, and that a failure to do so is negligence. But that the plaintiffs did not make all the inquiry and examination on the return of the check which the defendants now demand, affords no good reason why plaintiffs should not recover in this action.

It was, without doubt, formerly the rule that, if a party pays money under a mistake of fact, and no laches is imputable to him in respect of his omitting to avail himself of the means of knowledge within his power, he might recover back the money.

Milnes *v.* Duncan, 6 B. & C., 671: But the limitation of the rule, with respect to laches, in such cases has been modified.

Kelly *v.* Solari, 9 M. & W., 54: In this case one Solari had an insurance on his life in the plaintiff's company. He had made default in the payment of a premium due on the 3d of September, by which the policy lapsed. The actuary advised two of the directors of the default; one of them, "Clift," wrote on the policy the word "lapsed." After the death of Solari, which happened in October next after the default, his wife, who had entered upon the administration of his estate, made a demand on the company for the amount of the policy. Three of the directors, including the two who had known of the default and the lapsing of the policy in September previous, and the one who had made the entry of the word "lapsed," paid the amount. After discovering the mistake, an action was brought against the executrix to recover the money. The two directors, on the trial, testified that at the time of the payment they had entirely forgotten that the policy had lapsed. The plaintiff was non-suited on the trial, the chief baron deciding that if the directors had had knowledge, or the means of knowledge, of the policy having lapsed, the plaintiffs could not recover, and their afterwards forgetting it could make no difference. But a new trial was ordered, Baron Parke saying, "that if money be paid under the impression of the truth of a fact, which is untrue, it may, generally speaking, be recovered back, however careless the party may have been in omitting to use diligence to inquire into the fact." In that case the counsel for the defendant, in opposing the motion for a new trial, urged that the defendant was an executrix, that the money paid had become assets of the estate, and that if plaintiff succeeded the loss would fall upon her.

In Townsend *v.* Crowely (8 C. B., N. S., 477) it was held that the mere fact that the person who paid the money had at the time of payment means of knowledge of which he neglects to avail himself, will not disentitle him to recover the money back, if it was paid under a real mistake.

Lucas *v.* Warrack, 1 Moody & Robinson's R., 293; Darly *v.* Floys, 12 B. R., 531; 2 Smith's Leading Cases, ed. of 1873, (Marriott *v.* Hampton,) and cases cited, marg. page 402.

There is no rule that because a party has the means of knowledge he has the knowledge itself, or that as a condition to a recovery he should have actually possessed himself of the knowledge within his reach, nor can it be maintained that the omission by a party to do everything in the conduct of his own business the performance of which might prevent loss to himself or others, is necessarily negligent.

But in Kingston Bank *v.* Eltinge, 40 N. Y., 391, it was held that "care and diligence are not controlling elements in the case. It is question of fact merely. The inquiry is, were the parties mutually in error, and did they act upon such mutual mistake; not whether they ought to have so acted. If, in consequence of such mutual mistake, one party has received the property of the other, he must refund, and this without reference to vigilance or negligence."

In the Union Bank of Troy *v.* The Sixth National Bank, 43 N. Y. R., it was objected by the defendants to the plaintiff's right of recovery that he had been negligent in an omission to make inquiries, and to use the means at hand for arriving at correct information of the facts before parting with the money, but it was held in that case that it is no defence; that the mistake arose from a want of care on the part of the plaintiff.

See also Carrol Bank *v.* Bank of Albany, 1 Hill, 287.

Before taking this check from Greenleaf on the 16 February, the defendants were as much bound to make inquiries in regard to its genuineness as the plaintiffs were before accepting it on the following day. The defendants had means of inquiring within its reach. They used none. And before sending it to the clearing house they impressed upon it the sanction of their own stamp, as an evidence of their belief in the trueness of the paper.

In such condition it came to and was accepted by the plaintiffs as true. Viewed in a moral light, each party was guiltless. In the law, the negligence of the one is no greater than that of the other, and for this reason it is inequitable in the defendant to detain the money paid by plaintiff under a mistake common to each.

At the close of the evidence the defendant's counsel asked the judge before whom the trial was had to submit to the jury the question, whether the defendants had been injured by the laches or negligence of the plaintiffs, in notifying the defendants of the alleged mistake, and that the court refused and the defendants excepted.

The defendants request assume that there was negligence in respect to the notification: negligence is neither to be assumed nor presumed. It is true that negligence is often a question of mingled law and fact. But in this case, whether the plaintiffs had omitted such duties, or had failed to exercise such care and diligence as amounted to negligence, were facts to be determined by the jury. The fact that there was negligence in the plaintiffs should have been found before they should have been called upon to consider its consequences to the defendants.

The forgery was not discovered by the plaintiffs until the 1st of March, when Vermilye & Co. returned the check. Immediate notice was then given to the defendants and a demand of payment made.

The position of the defendant, if not earlier, was fixed on the 17th February, when, through the exchanges of the clearing-house, the checks of Greenleaf on them to an amount exceeding $17,000 were paid. This took from the defendants more than the amount of the forged paper. The plaintiffs were under a duty, without doubt, to notify the defendants of the forgery, as soon as it was discovered by them; and had the forgery been brought to the plaintiff's knowledge before the defendants parted with the credit they had given Greenleaf on the faith of the forged check, and there had been a culpable omission to give notice in time to save them from loss, it might well be that the plaintiffs should not recover in this action.

The remedy of the defendants is against Greenleaf now, as it would have been on the 17th February, had the forgery been then discovered by the plaintiffs, and they had then refused the check. Under such circumstances the plaintiffs would have made immediate reclamation on the defendants for the amount paid through the clearing-house, and the defendants would have proceeded against Greenleaf. This course is still open to them. Of the deposits made by Greenleaf on the 16th February, there still remains with the defendants undrawn a balance of $2,626 24, which has been attached. By whom or upon what ground it has been seized, and whether before or since the discovery, and no notice by the plaintiffs of the forgery, does not appear. But in the view taken of this case, this attachment cannot be interposed by defendants to affect in any way the plaintiff's right of recovery, and it would be difficult to conceive how any creditor of Greenleaf could make a claim to this balance, which was placed to his credit on the faith of a check which proved to be a forgery.

Upon the facts this money still belongs to the defendants. Greenleaf himself can make no valid claim to it, and no creditor can have a better right to the money than Greenleaf himself.

The judgment should be affirmed.

New York, *January* 9, 1874.

The foregoing is a copy of the original opinion on file in the office of the reporters of the Superior Court of New York.

JAMES C. SPENCER,
SAMUEL JONES,
Reporters.

per JAMES C. SPENCER.

AFFIRMED IN THE COURT OF APPEALS.

The National Bank of Commerce in New York, Respondent,
v.
The National Mechanics' Banking Association, Appellant.

RAPALLO, J.—It is now settled, both in England and this State, that money paid under a mistake of fact may be recovered back, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund.

To this rule, however, there are some exceptions, established by decisions which have been so long acted upon that it is not proper to disturb them. One is where the drawer of a draft or bill of exchange pays it to a *bona fide* holder, under the belief that the signature of the drawer is genuine, and it turns out to have been forged. It has been decided that the drawee is bound to know the signature of the drawer, and that if he accepts or pays, he cannot recall his act.

Price *v.* Noel, 3 Burr, —.
National Park Bank *v.* Ninth National Bank, 46 N. Y. R., 77.

So, also, it has been held that if one pays a draft purporting to be accepted by him, he cannot afterwards set up that the acceptance was a forgery, as against a *bona fide* holder, to whom the payment was made. That he was bound to know his own signature. (Mather *v.* Lord Maidstone, 18 Com. B., 273.) And, further, that if a bank pays what purport to be its own bills, or receives them on deposit, and passes them to the credit of its customer, it cannot recall the payment or revoke the credit, on subsequently discovering that the bills had been fraudulently altered by raising their amounts.

U. S. Bank *v.* Bank of Georgia, 10 Wheat., 333.

The learned counsel for the appellant seeks to deduce from these cases a general principle that every party is bound to know his own obligations, and that after having recognized and paid what purports to be his own obligation, he will not be permitted to allege a mistake in reference to its genuineness.

Language is used in some of the cases which appears to sustain this view; but this language must be construed with reference to the circumstances of the case in which it was used.

It must also be borne in mind that the cases referred to are rather exceptions to a general rule than adjudications establishing a legal principle, and care must be taken when applying them to see that, in the case to which they are sought to be applied, all the conditions upon which the exception depends exist. (Goddard *v.* The Merchant's Bank, 4 Coms., 149.)

In all the cases referred to as falling within the exception, the alleged mistake consisted in the recognition, as genuine, of a forged signature, either of the party paying or of his correspondent, whose signature he was held bound to know; and in the case of the bank bills, in the recognition as genuine of bills issued by the bank itself, the body of which, as well as the signatures, were the work of the bank. In the case of the bank bills, considerations of public policy, connected with the character of the bills as currency, entered largely into the reasoning of the court, and are much relied upon by Story, J., in the elaborate opinion which he delivered. But giving to the decision, for present purposes, its largest scope, it goes no further than to hold, that in case of an alteration in the body of an instrument, the recognition of the altered instrument as genuine is binding upon the party who made the body as well as the signatures, and the distinguishing feature of all the cases is that the forgery ought to have been detected by a bare inspection of the instrument itself, without the necessity of reference to books, or anything outside of the document presented. even the memory of the party as to the written obligations which he has issued.

In the present case, it is contended that when the check for $53 was certified by the Bank of Commerce, such certification made it an obligation of that bank. That when subsequently presented to the bank in its altered condition as a check for $15,006 00, the bank was bound to know its own obligation, and to detect the forgery, and that the bank, by recognizing it as genuine, and acquiescing in the payment through the clearing-house, precluded itself from afterwards setting up its own mistake.

On general principles, mere negligence in making the mistake is not, as has been already shown, sufficient to preclude the party making it from demanding its correction. Such negligence does not give to the party receiving the payment the right to retain what was not his due, unless he has been misled and prejudiced by the mistake. If his loss had been incurred and become complete before the payment, he should not, in justice, be permitted to avail himself of the mistake of the other party to shift the loss upon the latter.

To render it compulsory upon the courts to refuse a correction of the mistake, the facts of the case must bring it within the excepted ones before referred to. This, the facts of the present case fail to do. The essential element is wanting, that the body of the instrument as well as the certification was the work of the bank, and that therefore it was conclusively presumed to know, by a mere inspection of the instrument, whether or not it had been altered.

The bank was not bound to know the handwriting or genuineness of the filling up of the check. It was legally concluded only as to the signature of the drawer and its own certification.

The rules of law, in relation to the correction of mistakes of fact, have been gradually growing more liberal, and are moulded so as to do equity between the parties. The exceptions which have been established by authority, and have been engrafted upon the commercial law, it is not our purpose to disturb. But they should not be extended. Unless a case is clearly brought within them, the general principles should govern. No case has been cited, nor do I think any case can be found, which holds that a payment by mistake, such as is shown in the present case, cannot be recovered back.

If the defendant had shown that it had suffered loss in consequence of the mistake committed by the plaintiff, as for instance, if in consequence of the recognition by the plaintiff of the check in question, the defendant had paid out money to its fraudulent depositor, then, clearly to the extent of the loss thus sustained the plaintiff should be responsible. But it appears that all the money which Greenleaf, the fraudulent depositor, obtained from the Mechanics' Banking Association, on the credit of the altered check, was paid out on the 16th of February, the day before the check was presented to the plaintiff. On the 16th Greenleaf drew out of the Mechanics' Banking Association a larger amount than that for which it had given him credit on the faith of the altered check, and he drew none afterwards. The recognition of this check by the plaintiff on the 17th of February could not have had any influence upon the action of the Mechanics' Banking Association in paying Greenleaf's drafts on the 16th. The loss occasioned by those payments had been fully incurred by the Mechanics' Banking Association, before the plaintiff had made the mistake which it seeks in this action to have corrected. Such being the case, there is no equity in the claim of the Mechanics' Banking Association to retain the money which it obtained from the plaintiff through mistake, and thus to shift the loss, which it had sustained through the fraud of its own customer, from itself to the plaintiff.

Neither do we find anything in the conduct of the plaintiff, after the payment of the check, which should preclude it from reclaiming the money which it has paid. Delay in discovering and giving notice of the mistake is complained of. But the evidence shows that the notice was given immediately on the discovery of the mistake, and it fails to show that by the failure to receive earlier notice any damage was sustained by the defendant.

All the judges of the court below are agreed upon this branch of the case, notwithstanding their division upon the principal question.

The judgment should be affirmed.

A copy, but not for publication.

H. E. Sickels,
Reporter, per C.

"Rappallo, J., reads for affirmance. All concur."

A copy minutes.

H. E. Sickels,
Reporter, per C.

1. Earl p 102

Wilkinson & Johnson

3. [illegible] Cushing

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